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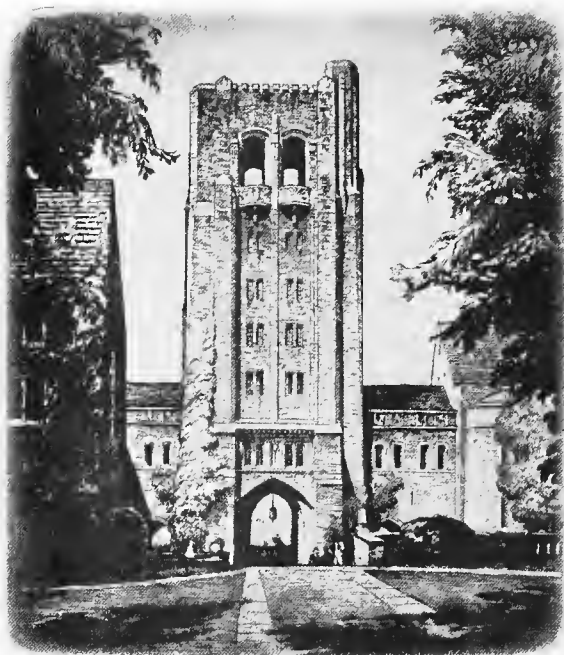
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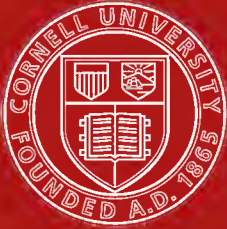
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WITH AN  
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*Second Edition,*

REVISED AND ENLARGED; WITH NOTES AND REFERENCES TO  
STATUTES AND LATER DECISIONS.

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BY OLIVER L. <sup>ORNZO</sup>BARBOUR, LL.D.

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# ANALYSIS

OF

## ORIGINAL APPENDIX OF PRECEDENTS.

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# ANALYSIS

OF

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UNDER THE EXISTING CONSTITUTION, JUDICIARY ACT  
AND CODE OF PROCEDURE.

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#### CHAPTER I.

##### BILL OF COMPLAINT.

###### No. 1.

*Bill by an infant, suing by his next friend, against executors, for a legacy.*

See Vol. I, pp. 33, 35.

IN CHANCERY.

Before the Chancellor.

[*or, Before the Vice-Chancellor  
of the ——— circuit.*]

*The address.*] To the Chancellor of the State of New York.

*The introduction.*] Complaining showeth unto your honor your orator A. B., son of J. B., of the city of Albany, merchant, an infant under the age of twenty-one years, to wit, of the age of about twelve years, by his father and next friend.

*The stating part.*] That J. S., of the city of Albany aforesaid, physician, being seized and possessed of a considerable real and personal estate, did, on or about the twentieth day of October, in the year of [\*VOL. II, 354] our \*Lord one thousand eight hundred and forty-two,

- \*2 duly\* make, execute, and publish his last will and testament, in writing, and thereby, amongst other things, devised and bequeathed as follows: [*Recite the devise in the will.*] And that the said testator did, in and by his said last will and testament, constitute and appoint C. D. and E. F. executors thereof. And that the said testator departed this life on or about the twenty-fifth day of October, in the year of our Lord one thousand eight hundred and forty-two, not having revoked, altered or annulled his said last will and testament, or the provision therein for the benefit of
- \*3 your orator as aforesaid,\* but leaving the said will and every part and portion thereof, in full force and effect. And that upon, or soon after, the death of the said testator, to wit, on or about the first day of November, in the year of our Lord one thousand eight hundred and forty-two, the said C. D. and E. F., the executors named in the said will, duly proved the said will before Moses Patten, the surrogate of the county of Albany, and took upon themselves the burthen of the execution thereof, and by
- \*4 virtue thereof possessed themselves of all the said\* testator's real and personal estate, goods, chattels and effects, to the amount of one thousand dollars, and upwards; which was more than sufficient to pay and satisfy all the said testator's debts, legacies and funeral expenses.

And your orator further showeth unto your honor that he hath, by his said father and next friend, several times since his said legacy of five hundred dollars was due, applied to the said C. D. and E. F. to have the same paid, or secured for the benefit of your orator; and your orator well hoped that the said C. D. and

\*5 E.\* F. would have complied therewith, as in equity and good conscience they ought to have done.

*Confederating part.*] But now so it is, may it please your honor, that the said C. D. and E. F. combining and confederating together, to and with divers other persons, as yet to your orator unknown, but whose names when discovered your orator prays may be inserted herein as defendants, and they made parties hereto, with proper and apt words to charge them, how to injure and oppress your orator; the said confederates respectively do

\*6 now absolutely refuse to pay or secure the payment of your\* orator's said legacy, sometimes pretending that the said testator did not make any such will, or if he did that he revoked the same previous to his death, and at other times they admit that

the testator made such will, and that they have proved the same [\*VOL. II, 355] and possessed \*themselves of all his real and personal estate; but then they pretend that the same was very small and inconsiderable, and not near sufficient to pay and satisfy the said testator's just debts, legacies and funeral expenses, and that they have applied and disposed of the same towards the satisfaction\* thereof; and at the same time the said confederates do \*7 respectively refuse to set forth and discover what such real and personal estate was, or the particulars whereof the same consisted, or the value thereof, or how much thereof they have so applied, and to whom, and for what paid, or what is become thereof particularly.

*Charging part.]* Whereas your orator expressly charges the truth to be that the said testator died seized and possessed of such real and personal estate, to the full value aforesaid, and which was much more than sufficient to pay all the said testator's just debts, legacies,\* and funeral expenses; and that the said confederates, or \*8 one of them, have possessed and converted the same to their own use, without making any satisfaction to your orator for his said legacy.

All which actings, doings and pretences of the said confederates are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator.

*Clause of jurisdiction.]* In tender consideration whereof, and forasmuch as your orator is remediless in the premises, at and by the strict rules of the common law, and is only relievable in a court of equity where matters of this nature\* are properly cogni- \*9 zable and relievable.

*Interrogating part.]* To the end, therefore, that the said C. D. and E. F. and their confederates may respectively, full, true, direct and perfect answers make, *upon their respective corporal oaths*, according to the best of their respective knowledge, information and belief, to all and singular the matters and charges aforesaid, [or if an answer on oath is waived, omit the words in italics, and insert here—(your orator hereby waiving, pursuant to the statute, the necessity of the answer of such defendants, being put in under the oaths of the said defendants, or the oath of either of them)], and that as fully and particularly in every respect as if the same were here again repeated and they thereunto particularly interrogated; and more especially that they may respectively set forth and discover, according to the best of their knowledge, remembrance, information and belief, whether the\* said \*10

testator J. S. duly made, executed and published such last will [\*Vol. II, 356] and testament, in writing, of such \*date and to such purport and effect as aforesaid, and thereby bequeathed to your orator such legacy of five hundred dollars, as aforesaid, or any other, and what last will, if any other, and what date, and to any other and what purport or effect particularly, and that they may produce the same or the probate thereof, to this honorable court, whenever and as often as there shall be occasion; and

\*11 whether by such will, or any other, and what will, the\* said testator appointed the said C. D. and E. F. or any other and what persons, executors of such last will and testament; and whether the said testator departed this life on or about the twenty-fifth day of October in the year of our Lord one thousand eight hundred and forty-two, or at any other, and what time; and whether he revoked, altered or annulled the said last will and testament before his death, or the provision therein for the benefit of your orator, and when, and before whom, and in what manner;

\*12 and whether the said C.\* D. and E. F. or one, and which of them proved the said will, and when, before whom, and in what manner; and whether they took upon themselves the burthen of the execution thereof, and by virtue thereof possessed themselves of all the said testator's real and personal estate, goods, chattels and effects. And that they respectively set forth whether your orator, by his said father and next friend, hath not several times since his said legacy was payable, applied to them to have the same

\*13 paid, or secured to be paid, for his benefit, or to that effect; and\* whether the said C. D. and E. F., or one, and which of them, refused or neglected to comply with your orator's requests and for what reasons respectively, and whether such refusal was grounded on the pretences herein before charged, or any, and which of them or any other and what pretences particularly.

*Prayer for relief.*] And that the said C. D. and E. F. may admit assets of their said testator come to their hands sufficient to satisfy your orator's said legacy, and subject thereto, or otherwise may set forth a particular account of the real and personal estate,

\*14 goods and effects,\* of which the said testator died possessed or entitled unto, and the particulars whereof the same consisted, and the value thereof, and how much thereof they have applied in discharge of the said testator's debts, legacies and funeral expenses, and to whom and for what purpose, and what is become thereof



particularly; and whether the said testator did not die possessed of real and personal estate, goods and effects, to the value of one thousand dollars and upwards. or what other value, and whether [\*Vol. II, 357] the same was not, \*more than sufficient to pay and satisfy all the said testator's debts,\* legacies and funeral expenses; and that they may also set forth a just and true account of all such debts and sums of money as were really due and owing, by and from their said testator, at the time of his death, and to whom, by name, and on what security or securities, and how, and on what account such debts were respectively contracted, and which of them now remain unpaid and unsatisfied, and that they may be compelled by a decree of this honorable court to pay your orator's said legacy of five hundred dollars; and that the same\* \*16 may be placed out at interest for your orator's benefit, until your orator attains his age of twenty-one years; and that the said sum of five hundred dollars may then be paid him. And that in the meantime the interest thereof may be paid to your orator's said father J. B. towards the support and maintenance of your orator. And that your orator may have such further relief, or may have such other relief as the nature of the case shall require and as shall be agreeable to equity.(a)

*Prayer for process.] If an injunction or a ne exeat is asked for, insert the prayer therefor, in this place.]* May it please your honor to grant unto your orator\* the writ of subpoena issuing out of and \*17 under the seal of this honorable court, to be directed to the said C. D. and E. F. commanding them and each of them, by a certain day, and under a certain penalty therein to be inserted, to be and appear before our chancellor, in our court of chancery, and then and there to answer the premises, and further to stand to and abide such order and decree therein as shall be agreeable to equity and good conscience.

And your orator shall ever pray, etc.(b)

#### COMMENCEMENTS OF BILLS.

*Bill by a married woman suing by her next friend.]* Complaining showeth unto your honor your oratrix J. B. the wife of A. B., of, etc. by C. D. her next friend. That, etc.

(a) If an injunction is wanted it must be asked for in the prayer for relief, as well as in the prayer for process. Vol. I, p. 57.

(b) The above will suffice to exhibit the structure and several parts of an original bill. It is not the intention of the writer to multiply illustrations. This is prevented by want of room. An example of each kind of bill treated of in the 4th Book, will, however, be given hereafter.

*By husband and wife.*] Complaining show unto your honor your orator and oratrix A. B., of, etc. and E. his wife.

*\*Bill of a corporation.*] Complaining showeth unto [\*VOL. II, 358] your honor, your orators, the mayor, aldermen and commonalty of the city of A.

*Bill by attorney-general.*] Complaining showeth unto your honor your orator G. P. B., attorney-general of the state of New York, in behalf of the people of said state.

*Bill by attorney-general on the relation of others.*] Complaining showeth unto your honor your orators, G. P. B., attorney-general of the state of New York, at and by the relation of A. V.

*Bills by idiots and lunatics, suing by their committee.*] Complaining show unto your honor your orators A. B., of, etc. and C. D., of, etc. (against whom a commission of lunacy has lately been awarded and issued, which is now in force, and under which said commission the said C. D. was duly found and declared to be a lunatic; and your orator, A. B. appointed committee of his person and estate). That, etc.

*By creditors, legatees, etc. on behalf of themselves and other persons of the same class.*] Complaining show unto your honor your orators and oratrices, A. B., E. F. and G. H., of, etc., on behalf of themselves and all other the bond and simple contract creditors [*or legatees and next of kin*] of C. D. [*late of S. P. deceased*], who shall come in and contribute to the expenses of this suit.

#### SPECIAL INTERROGATORIES

*As to a deed set forth in bill.*] Whether such indenture, bearing date on or about the — day — as hereinbefore particularly mentioned, was not made between such parties as hereinbefore set forth, or some, and which of them, and was not of such purport as hereinbefore stated; or whether some indenture, of some and what date, was not made by and between some and which of the said parties, and was not of some such or the like purport or effect, or how otherwise?

*As to the making of applications and requests.*] And whether your orator hath not by himself or agents, or how otherwise, made such applications and requests to the said defendants as are hereinbefore in that behalf mentioned, or some such or the like, or any, and what other applications and requests in respect to the several matters aforesaid, and whether the said defendants have not refused to comply therewith, and why?

## PRAYERS OF BILLS.

1. *To restrain proceedings in a suit at law, and for an injunction.*] And that the said C. D. and E. F. their counsellors, attorneys, solicitors, officers or agents, may be restrained by an injunction issuing out of this court, from proceeding further against your orator in the said [\*VOL. II, 359] \*action commenced against him in the supreme court of this state, and now pending and at issue therein, for the recovery of the possession of said premises, with their appurtenances; and also from instituting or proceeding in any new or other action at law for the recovery of the possession of said premises or any part thereof. And that your orator may have [*prayer for general relief.*] May it please your honor, to grant unto your orator the people's writ of injunction, issuing out of and under the seal of this court, directed to the said C. D. and E. F., their counsellors, attorneys, solicitors and agents, commanding them and each of them, absolutely to desist and refrain from proceeding further against your orator in the said action [*as above.*]

2. *For an account of the rents and profits of a testator's real estate.*] And that the said defendants may set forth a full, true, and just rental and particular of the real estates, whereof or whereto the said testator was seized or entitled in fee simple, at the time of his death; and also a full, true, and particular account of all and every sum and sums of money which hath or have been received by them, or either of them, or any other person or persons, by their or either of their order, or for their or either of their use, for, or in respect of the rents and profits of the said estates, or any part thereof; and whether any, and which of the said estates, or any part or parts thereof, have or hath not been sold or disposed of, and at what price or prices respectively, and when and to whom; and whether such price or prices respectively have or hath not been paid, and to whom; and if not, why not?

3. *For an account of money had and received.*] And that the said defendants may set forth an account of all and every sum and sums of money received by them or either of them, or by any person or persons by their or either of their order, or for their or either of their use, for or in respect of the said [*as the case stated in the bill may be,*] and when and from whom, and from what in particular all and every such sums were respectively received, and how the same respectively have been applied or disposed of.

4. *For the production of deeds and papers.*] And that the said defendants may set forth a list or schedule, and description of every deed, book, account, letter, paper, or writing relating to the matters

aforesaid, or any of them ; or wherein, or whereupon there is any note, memorandum, or writing, relating in any manner thereto, which now are, or ever were in their or either, and which, of their possession or power ; and may particularly describe which thereof now are in their, or either, and which of their possession or power, and may deposit the same in the office of the register of this court [*or, the clerk in chancery* [\*VOL. II, 360] \**for the fourth circuit,*] for the usual purposes ; and otherwise that the said defendants may account for such as are not in their possession or power.

5. *For an account of personal estate.*] And that the said defendants may discover and set forth a full, true, and particular account of all and singular the personal estate and effects of the said testator, and of every part thereof, which hath been possessed by, or come to the hands of, the said defendants, or either of them, or to the hands of any other person or persons by their or either of their order, or for their or either of their use ; with the particular nature, quantities, qualities, and true and utmost values thereof, and of every part thereof respectively ; and how the same and every part thereof, hath been applied and disposed of ; and whether any, and what part thereof, now remains unapplied and undisposed of ; and why ; and whether any, and what part of such personal estate remains outstanding, to any, and what amount, and why ; and that the said defendants may also set forth an account of the debts due from the said testator, and of his funeral expenses and legacies ; and whether any, and which, of such debts are outstanding, and why ?

6. *For a ne exeat.*] And that the said defendants may be stayed by the people's writ of *ne exeat respublica* from departing out of the jurisdiction of this court. And that your orator [*prayer for general relief.*] May it please your honor to grant unto your orator the people's writ of *ne exeat respublica* staying the said C. D. and E. F., or either of them, from departing into parts beyond this state, and out of the jurisdiction of this court, without leave first had.

7. *In suits against the United States, or a state.*] And may it please your honor that the district attorney of the United States for the — district of New York, [*or, the attorney-general of the state of New York,*] on being attended with a copy of this bill, may appear and put in an answer thereto, and may stand to, and abide such order and decree in the premises as to your honor shall seem meet.

8. *In suits against a corporation.*] And that the said the president, directors and company of the Schenectady Bank may appear according to law, and the course and practice of this court.

## METHODS OF SIGNING BILL.

Vol. I., p. 43.

*Bill by a private person, not sworn to so as to require an answer on oath.*

C. M. D., solicitor for complainant.

J. E., of counsel for complainant.

\* *Where complainant sues in person.*

[\*VOL. II, 361]

A. B., complainant in person.

*Bill by a corporation not sworn to.*

C. M. D., solicitor for complainant.

J. E., of counsel for complainant.

*Bill by a corporation, sworn to.*

C. M. D., solicitor for complainants.

I. F., Cashier of the

J. E., of counsel for complainants.

B. S. Bank.

[*Jurat.*]

Bills of complaint filed by corporations are not put in under the corporate seal; though it is otherwise as to answers by them.

*Bill by an infant, suing by his next friend.*] The general rule is that sworn bills must be signed by the party who verifies them. A bill in behalf of an infant is in general sworn to by the next friend, and in that case he will of course sign it; but the infant himself *may* be better acquainted with the facts than his next friend; and when this is the case he is the proper person to sign and swear to the bill, provided he is of a suitable age. Where the next friend signs the bill, he need not sign it as next friend; as the commencement of the bill shows in what character he brings the suit.

*Bill asking for an injunction, or discovery, or requiring an answer on oath.*

C. M. D., solicitor for complainant. }

A. B., complainant. }

J. E., of counsel for complainant. }

[*Jurat.*]

## METHODS OF SWEARING TO BILL.

Vol. I., p. 43.

The general form of a jurat, where the bill is verified by the complainant himself, is stated, Vol. I., p. 44.

*By an agent or attorney.*] [*Commence as in the general form*].—personally appeared H. D. and made oath that he has read the above bill subscribed by him, [or, *has heard it read,*] and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated to be on the information and belief of the complainant, and that as to those matters the deponent believes it to be true.

*Bill by a corporation.*] [*Commence as in the general form*].—personally [\*VOL. II, 362] appeared W. W. and made oath that he is now and for several years past has been the superintendent of the U. and S. Railroad Company, the corporation named as complainants in the above bill; and that by means of his said office he has acquired, and possesses, as he verily believes, greater and more particular knowledge of the matters stated in said bill, than any other officer or member of said corporation; inasmuch as said matters relate particularly to the sphere of duties of deponent as such superintendent; that he has read the above bill subscribed by him, [or, *has heard it read,*] and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated to be on the information and belief of the complainants, and that as to those matters he has been so informed, and believes it to be true.

*By an attorney in fact.*] [*Commence as in the general form*].—personally appeared M. W. and made oath that he has read the above bill subscribed by him, [or, *has heard it read,*] and knows the contents thereof; that he has information as to all the matters stated therein, and from such information believes such matters to be truly stated therein, and that such bill is true. That deponent is the attorney in fact for A. B. the complainant in the above bill, for the purpose of filing the same, and recovering of the defendant the sum of money therein mentioned, constituted and appointed by such complainant by a power of attorney duly executed and delivered by him. And that the said A. B. is now, as deponent verily believes, absent from this state, to wit, in the republic of Texas; he having left this state for that republic, on or about the — day of — last past; and that he is not expected to return therefrom in some considerable time.

## No. 2.

*Affidavit annexed to bill, to prevent dissolution of injunction.*

Vol. I., p. 47.

IN CHANCERY.

Before the Chancellor,

[or, before the Vice-Chancellor

of the ——— circuit.

<p>A. B.</p> <p style="text-align: center;">v.</p> <p>C. D. and E. F.</p>	}
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STATE OF NEW YORK, }  
*Saratoga County,* } ss.

John Jones of Saratoga Springs, in said county, being duly sworn, [\*VOL. II, 363] deposeth and saith(\*) that he \*has read the bill of complaint in this cause, [or, *has heard it read,*] and knows the contents thereof; that he is familiar with all the material matters stated in said bill, and has actual knowledge thereof, and that from such knowledge he knows that the matters of fact therein stated are true. And this deponent further saith, that he has no interest whatever in the event of this suit. And further this deponent said not.

JOHN JONES.

Oath and jurat. See Vol. I., pp. 603, 604.

CHAPTER II.  
PROCESS FOR APPEARANCE.

No. 3.

*Subpœna to appear.*

See Vol. I., p. 48.

The People of the State of New York, to C. D. greeting :  
[L. s.] We command you that you personally appear before our  
chancellor, [or, *our vice-chancellor of the fourth circuit,*] in  
our court of chancery, on the twentieth day of August instant, where-  
soever the said court shall then be, to answer to a bill of complaint  
exhibited against you in our said court by A. B.; and to do further,  
and receive what our said court shall have considered in that behalf.  
And this you are not to omit under the penalty of two hundred and  
fifty dollars.

Witness, Reuben H. Walworth, chancellor of our said state, at the  
town of Saratoga Springs, the first day of August, in the year of our  
Lord one thousand eight hundred and forty-three.

J. M. D., Register.

[or, *Clerk.*]

H. M., Solicitor.

\*No. 4.

[\*VOL. II, 364]

*Affidavit to obtain an attachment for not appearing, where subpœna has  
been served, but not personally.*

See Vol. I., p. 55.

[*Title of cause as in No. 2.*]

STATE OF NEW YORK, }  
Saratoga County, } ss.

John Jones of Saratoga Springs, in said county, the solicitor for the  
complainant in this cause, being duly sworn, deposeth and saith, that



on the. — day of —, and before the appearance day therein mentioned, this deponent(\*) served upon C. D., the defendant in this cause, the subpœna issued therein under the seal of this court, [*which subpœna is hereto annexed,*] by leaving a copy thereof at the store of the said C. D. in the town of Milton, in said county, with one P. C., a clerk of the said C. D. : the said C. D. being absent from home and no person being found at his usual place of abode, with whom such copy could be left. And this deponent further saith that no appearance has been entered in this cause by the said C. D. to the knowledge or belief of this deponent, and that no notice of appearance on his behalf has been served on him. [*If the subpœna is not annexed to the affidavit, instead of the words in brackets, the affidavit should be as follows:—tested the — day of —, and requiring the said C. D. to appear personally before the chancellor in the court of chancery on the — day of — then next, wheresoever the said court should then be, to answer to the bill of complaint exhibited against him [and others] by the complainant in this cause.*]

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### No. 5.

*Affidavit to obtain an attachment for not appearing, where subpœna has been personally served.*

See Vol. I., p. 55.

*As in No. 4. to the asterisk (\*),*] personally served upon C. D. the defendant in this cause the subpœna issued therein, and which is hereto annexed, by showing to the said C. D. the original writ, under the seal of this court, and leaving with him a copy thereof. [*If the subpœna cannot be annexed, the affidavit must state its purport, as directed in No. 4.*] And this deponent further saith, that no appearance has [\*Vol. II, 365] been \*entered in this cause by the said C. D. to the knowledge or belief of this deponent, and that no notice of appearance on his behalf has been served on him; and that a discovery is necessary from the said defendant as to the matters of the bill of complaint in this cause. And further saith not.

[Oath and jurat. See No. 2.]

## No. 6.

*Order for an attachment for not appearing.*

At a court of chancery held  
for the state of New York at the  
town of Saratoga Springs, on the  
— day of — 1843.

Present—Reuben H. Walworth, Chancellor,  
[or, *John Willard, Vice-Chancellor*  
*of the 4th circuit.*]

[*Title of cause as in No. 2.*] On filing due proof of the personal service of the subpoena issued in this cause on the defendant C. D. on or before the return day thereof; and [*on filing an affidavit of C. M. D., solicitor for the complainant, stating that he has not been served with notice that the appearance of said defendant C. D. has been entered in this cause—or—it appearing that said defendant C. D. has not caused his appearance in this cause to be entered,*] on motion of Mr. D., solicitor for the complainant, it is ordered that an attachment be, and the same is hereby awarded against the said defendant C. D.

## No. 7.

*Attachment.*

See Vol. I., p 54.

The People of the State of New York, to I. F., sheriff of the  
[L. s.] county of Saratoga—greeting: We command you that you  
attach C. D. so as to have his body before our chancellor, [or,  
*our vice-chancellor of the fourth circuit,*] in our court of chancery, on the  
third Tuesday of September instant, wheresoever the said court shall  
then be; there to answer unto us, as well touching the contempt  
which he, as is alleged, hath committed against us, as also such other  
[\*VOL. II, 366] matters \*as shall then and there be laid to his charge;  
and further to perform and abide such order as our said court shall  
make in this behalf. And have you then and there this writ, and make  
and return a certificate, under your hand, of the manner in which you  
shall have executed the same. Witness, Reuben H. Walworth, Chan-

cellor of our said state, at the town of Saratoga Springs, the 2d day of September, in the year of our Lord one thousand eight hundred and forty-three.

H. M. Solicitor.

J. M. D., Register,  
[or *Clerk*].

*Alias Attachment.*

Same as above, except that after the words "we command you," you, insert "as you were before commanded."

*Pluries Attachment*

After the words "we command you," add—"as you were oftentimes before commanded."

*How endorsed.*] If the attachment is issued without special order, it must be endorsed in the manner directed, Vol. I., p. 56.

When issued by the special order of the court it should be endorsed: Attachment, [or, *alias, or pluries attachment,*] for not appearing to, [or *not answering*] the bill of A. B., returnable the third Tuesday of September, 1843. By the special order of the court not bailable.—Or, by the special order of the court. Hold the defendants to bail in the sum of \$——.

J. M. D., Register, etc.

*Return to.*] If the writ is *served*, and the defendant *gives bail*, the return is: "I have attached and let the defendant at large on bail according to the bond herewith returned.(a) I. F., Sheriff."

If the defendant, *on being arrested, neglects or refuses to give bail*, the return is: "By virtue of the within writ, I have attached the defendant C. D., and taken his body, and for want of bail, have him now here in custody, before the court."

When the attachment is put into the hands of the sheriff *at too late a period* to enable him to execute it before the return day, the return is: [\*Vol. II, 367] \*"I did not receive the within writ in time to arrest the defendant thereon, and bring him before the court on the return day thereof. I. F., Sheriff."

See Vol. I., p. 58, Com. Dig. Return, D. 1—*Quod breve tarde venit quod exequi non possunt.*

(a) The bond need not be *annexed* to the writ. It is to be returned with the attachment, and they are to be filed together; i. e. both filed. This is all that is required. See Vol. I., p. 58.

If the defendant *cannot be found*, the return is—"Not found.

I. F., Sheriff."

When the defendant is *already in custody*, the return is—"I have arrested the defendant on the within writ; previous to serving which, he was in my custody by virtue of a writ of *capias ad satisfaciendum* issued out of the supreme court at the suit of G. M.

I. F., Sheriff.

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No. 8

*Bond on attachment.*

See Vol. I., p. 57.

Know all men by these presents, that we, C. D. of the town of Saratoga Springs, and S. M. and L. P. C. of the same place, gentlemen, are held and firmly bound unto I. F., sheriff of the county of Saratoga, and his assigns, in the penal sum of one hundred dollars, to be paid to the said I. F. sheriff as aforesaid, or his assigns. For which payment well and truly to be made, we bind ourselves jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals and dated the 18th day of September, 1843. (\*)

Whereas the above named C. D. has been arrested upon an attachment issued out of, and under the seal of the court of chancery of the state of New York, for not appearing to [or *answering*,] a bill of complaint filed in said court, wherein A. B. is complainant, and the said C. D. [*impleaded with others*] is [a] defendant, and is now in the custody of the said I. F., sheriff as aforesaid.

Now the condition of this obligation is such, that if the above bounden C. D. shall appear before the chancellor of said state [or *the vice-chancellor of the fourth circuit*,] in the court of chancery, on the third Tuesday of September instant, wheresoever the said court shall then be, to answer to the matter alleged against him, and to perform and abide by the order and judgment of the said court thereupon, then this obligation to be void; otherwise to be and remain in full force and virtue.

Sealed and delivered in }  
the presence of }

C. D.            L. S.  
S. M.            L. S.  
L. P. C.        L. S.

[\*VOL. II, 368]

\* No. 9.

*Order for alias attachment, where defendant fails to appear on return of attachment, after having given bond.*

See Vol. I., p. 59.

At, etc. [as in No. 6.]

[*Title of cause. See No. 2.*] The sheriff of the county of Saratoga having returned the writ of attachment issued in this cause, against the defendant C. D., and returnable — day of — instant, “taken” together with the bond taken by him upon the arrest of said defendant; and the said defendant being now in open court called and failing to appear, on motion of J. R., of counsel for the complainant, it is ordered that (\*) an alias attachment issue against the said C. D., directed to the sheriff of the county of Saratoga, returnable on the — day of — next [or, *immediately,*] before the chancellor, [or, *vice-chancellor of the fourth circuit,*] in the court of chancery, wheresoever the said court shall then be. And it is further ordered that the said defendant be held to bail upon such writ in the sum of \$100.

## No. 10.

*Order for leave to prosecute bond, in the case mentioned in No. 9.*

See Vol. I., p. 58.

[*Commence as in No. 9, and continue to the asterisk(\*),*] the said bond, being forfeited, may be prosecuted by the complainant.

## No. 11.

*Order that register enter defendant's appearance, or that bill be taken as confessed, in the case mentioned in No. 9.*

See Vol. I., p. 59.

[*Commence as in No. 9, and continue to the asterisk(\*),*] J. M. D., the register of this court do enter the appearance of the said C. D. in this cause, pursuant to the statute in such case made and provided, [or *the bill of complaint in this cause be, and the same is hereby taken as confessed by the said C. D. pursuant to the statute in such case made and provided.*]

Missing Page

\*No. 12.

[\*VOL. II, 369]

*Order—when defendant appears, or is brought into court, on return of attachment, and admits his contempt—that he enter his appearance, (or put in his answer,) within a specified time.*

See Vol. I., p. 60.

[*Title of cause. See No. 2.*][*See No. 6.*]

It appearing to the court that the defendant C. D. being in contempt for not appearing to the bill filed in this cause, a writ of attachment had issued against him, directed to the sheriff of the county of Saratoga, returnable on the — day of — instant; whereupon the sheriff hath returned that he had attached the defendant, and had let him at large on bail, according to a bond returned with such attachment, [or, *that he had attached the said C. D. and taken his body, and that for want of bail he had him in custody before the court,*] and the said C. D. now being, by virtue of such attachment, personally before the court, (\*) and consenting to enter his appearance [or, *put in his answer,*] in this suit, and to pay the costs of his contempt, when duly taxed; on motion of Mr. W., of counsel for the complainant, it is ordered, [*that the bill of costs occasioned by such contempt be taxed by C. B., Esq. taxing master of the fourth circuit, within four days, and that a copy thereof, with notice of the hour and place of such taxation, be delivered to the said C. D. at least one day prior thereto. And it is further ordered,*] (b) that the said C. D. do forthwith cause his appearance in this cause to be entered with the register [or, *clerk*] of this court, and that he pay the costs [to be] taxed, within — days from the date of this order, or that the complainant may apply to this court for such further order as may be just. And it is further ordered that the bond executed by the said C. D. and his sureties be continued over; and that the said C. D. do attend this court from day to day, until the further order thereof.

\*No. 13.

[\*VOL. II, 370]

*Order for commitment, upon disobedience of No. 12.*

See Vol. I., p. 60.

[*Title and caption as in No. 12.*]

An order having been entered in this cause on the — day of —, requiring the defendant C. D. to cause his appearance in said cause

(b) If the costs are taxed by the court at the time of making the order, as they may be, the words in brackets are to be omitted.

to be entered, [or, *his answer to be filed,*] with the register of this court within — days from the date of said order, and to pay the costs occasioned by his contempt in not entering his appearance in said suit, within — days from the time when same should be taxed, [or, *date of said order :*] or that in default thereof the complainant might be at liberty to apply to this court for such further order as might be just ; and on reading an affidavit that such costs have been duly taxed at the sum of \$—, and that a copy of the taxed bill of costs with a certificate of taxation thereof by the taxing officer, has been duly served upon the said C. D. and payment thereof demanded, and that the same have not been paid by the said C. D. : and on reading and filing the certificate of J. M. D., the register of this court, showing that the said C. D. has not caused his appearance to be entered [or, *his answer to be filed,*] in this cause ; and this court now adjudging the said C. D. to have been guilty of the misconduct alleged, and that such misconduct was calculated to, or did, actually defeat, impair, impede, or prejudice the rights or remedies of the complainant in this cause—it is thereupon, on motion of Mr. N., of counsel for the said complainant,(†) ordered that the said C. D. be, and he is hereby ordered, to stand committed to the common jail of the county of Saratoga, there to remain charged upon this contempt until he shall have paid the costs of such contempt, so taxed as aforesaid ; unless the court shall see fit sooner to discharge him. And it is further ordered that a warrant issue for that purpose.

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No. 14.

*Order—in the case mentioned in No. 12—that the bill be taken as confessed, and that the defendant be committed until the costs are paid.*

See Vol. I., p. 60.

[*Title of cause same as in No. 2.*]

[*See No. 6.*]

[*As in No. 12, to the asterisk (\*),*] and admitting his contempt by refusing to appear, [or, *to put in his answer,*] to said bill ; and this court [\*VOL. II, 371] \*now adjudging the said C. D. to have been guilty of the misconduct alleged, and that such misconduct was calculated to, and actually did, defeat, impair, impede or prejudice the rights or remedies of the complainant in this cause—it is thereupon on motion of Mr. N., of counsel for the said complainant, ordered that the bill of



complaint in this cause be taken as confessed by the said C. D.; and it is further [*conclude as in No. 13, from the (†).*]

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No. 15.

*Order—in the case mentioned in No. 12, where defendant denies his contempt—directing the filing of interrogatories.*

[*Title of cause, see No. 2.*]

[*See No. 6.*]

[*As in No. 12, to the asterisk(\*),*] and denying that he is guilty of the misconduct alleged against him; on motion of Mr. N., of counsel for the said complainant, it is ordered that the said complainant do, within three days [or, *forthwith*] file in the office of the register of this court, interrogatories specifying the facts and circumstances alleged against the said C. D.; and that he serve a copy thereof on the said C. D.; and that the said C. D. put in written answers to such interrogatories, upon oath, and file the same within twenty-four hours after the time when such interrogatories are served on him, in the office of the register of this court. And it is further ordered, that it be referred to P. G. E., Esq. one of the masters of this court, residing in the county of Saratoga, to examine the said C. D., on oath, upon the said interrogatories; and to take such further proofs as either party may produce before him, in relation to the alleged contempt(c) and that he report such answers and proofs to this court. And it is further ordered that the said sheriff detain the defendant in his custody; and that the said C. D. attend from day to day before the chancellor, until the further order of the court.

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[\*VOL. II, 372]

\*No. 16.

*Interrogatories for the examination of a party, in pursuance of No. 15.*

[*Title of cause.*]

Interrogatories to be exhibited on the part of the complainant, for the examination of C. D. the defendant in this cause, pursuant to an order made in said cause on the — day of —, 1843.

(c) In the case of *Cumming v. Waggoner*, (7 *Paige*, 603,) it was held that upon a reference of this nature, the master is not authorized to receive the ex parte affidavits of witnesses; unless the order of reference expressly authorizes him to do so. And it was laid down by the chancellor as a general rule that the court will not allow ex parte affidavits to be used on such reference; but will compel the parties to produce and examine the witnesses before the master; so that they may be cross-examined by the adverse party.

*First interrogatory.* Were you, or were you not, on or about the — day of — last, or at any other, and what time, duly served with a subpœna to appear issuing out of, and under the seal of this court, to you directed, tested on or about the — day of — last, and commanding you personally to appear before the chancellor, in the court of chancery; on the — day of — last, wheresoever the said court should then be, to answer to a bill of complaint exhibited against you in the said court by A. B. ? Was or was not such subpœna served upon you by showing you the original under the seal of this court, and leaving with you a copy thereof? When and by whom was such service made? Answer this interrogatory fully and particularly.

*Second interrogatory.* Is not the writ of subpœna now shown and read to you the one served, and the copy whereof was so left with you? Answer fully.

*Third interrogatory.* Have you, or not, caused your appearance to be entered in this cause, pursuant to the exigency of the said subpœna? And when and in what manner?

[If the attachment was issued for not answering the bill, add a ]

*Fourth interrogatory.* Were you, or not, on or about the — day of —, served with a copy of the complainant's bill in this cause, with a notice thereon endorsed of an order requiring you to put in an answer to the same and serve a copy thereof on the complainant's solicitor within forty days, or that in default thereof an attachment would be issued against you? When and by whom, and in what manner was such service made? Answer fully.

*Fifth interrogatory.* Did you, or not, put in your answer to the said bill within the time limited for that purpose; or hath any, and what answer, yet, and when, been put in thereto, by you, or how otherwise? Answer fully.

C. M. D., Solicitor and of  
counsel for complainant.

\*No. 17.

[\*VOL. II, 373]

*Answer to the interrogatories in No. 16.*

[*Title of cause.*] The answer and examination of C. D. the defendant in this cause, to the interrogatories exhibited by the complainant for his examination, pursuant to an order of this court, dated the — day of —, 1843.

To the first interrogatory, this examinant answers and says, that, etc  
 Sworn and subscribed before me } C. D.  
 this — day of —, 1843. }

C. B., Master in Chancery.

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 No. 19.

*Order convicting defendant of a contempt after his examination upon interrogatories.*

See Vol. I., p. 60.

At, etc. [See No. 6.]

[*Title of cause as in No. 2.*]

A writ of attachment having been heretofore issued out of and under the seal of this court, against the defendant C. D., for his contempt in not causing his appearance to be entered in this cause, directed to the sheriff of the county of Saratoga, and returnable the — day of — instant; and the said sheriff having returned that he had attached the said C. D., and had let him at large on bail according to a bond returned with such attachment [*or, that he had attached the said C. D. and taken his body, and that for want of bail he had him in custody before the court;*] and the said C. D. having been by virtue of such attachment personally before the court on the said — day of — instant, and denying the alleged contempt, it was thereupon ordered that the complainant in this cause should, within three days [*or forthwith*] file in the office of the register of this court interrogatories specifying the facts and circumstances alleged against the said C. D.; and that he serve a copy thereof on the said C. D.; and that the said C. D. should put in written answers to such interrogatories, upon oath, and file the same within twenty-four hours after the service of such interrogatories; and that it should be referred to P. G. E., Esq., one of the masters of

this court, to examine the said C. D. on oath upon such interrogatories, and to take such further proofs as either party might produce before [\*VOL. II, 374] him in relation \*to the alleged contempt; and it now appearing to the court from the report of the said master, and the answers and proofs thereto annexed, that the said C. D. has committed the contempt with which he is charged, and this court now adjudging him to have been guilty of the misconduct alleged, and that such misconduct was calculated to, or did, actually defeat, impair, impede, or prejudice the rights of the complainant in this cause; it is, on motion of Mr. N., of counsel for the complainant, ordered that a fine of \$100 be, and the same is hereby imposed upon the said C. D. for his said misconduct. And it is further ordered that the said C. D. do pay to the said complainant the costs and expenses of the proceedings for such misconduct, and now taxed at the sum of — dollars. And it is further ordered that the said C. D. be, and he is hereby directed to stand committed to the common jail of the county of Saratoga, there to remain charged upon this contempt until he shall have caused his appearance to be entered in this cause, and paid such fine and costs; unless the court shall see fit sooner to discharge him. And that a warrant issue for that purpose.

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No. 20.

*Mittimus or warrant of commitment for contempt in not appearing.*

See Vol. I., p. 60.

The People of the State of New York, to the sheriff of the [L. s.] county of Saratoga, greeting:—Whereas on the — day of —, by a certain order made in our court of chancery, before our chancellor [or before our vice-chancellor of the fourth circuit] at the town of Saratoga Springs, in a certain cause depending in our said court between A. B. complainant and C. D. defendant, it was ordered that the said C. D. be committed to the common jail of the county of Saratoga, there to remain, charged with the contempt mentioned in said order, until he should [insert the direction contained in the order. See Nos. 13, 19;] and that a warrant issue for that purpose. Now we command you that you take the body of the said C. D., and him safely and closely keep in your custody in the common jail of the

county of Saratoga, until he shall have [*pursue the order*] and shall pay the costs and expenses taxed as aforesaid, with your fees hereon, or until our said court of chancery shall make an order to the contrary. And you are to make and return to our said chancellor, [*or vice-chancellor,*] in our said court of chancery, on the — day of — next, wheresoever it shall then be, a certificate under your hand, of your doings in the premises, together with this writ.

\*Witness, Reuben H. Walworth, Chancellor of our [\*VOL. II, 375] said state, at the town of Saratoga Springs, the — day of —, 1843.  
J. M. D., Register.

C. M., Solicitor for complainant.

*Sheriff's return to above mittimus or warrant.*

I, J. F., sheriff of the county of Saratoga, hereby certify and return that under and by virtue of the within writ to me directed, I have taken the within named C. D. into my custody, and have kept and do still keep him in my custody in the common jail of said county, as by the within writ I am commanded. Dated this — day of —, 1843.  
J. F. Sheriff

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No. 21.

*Order for a pluries attachment, where defendant makes default a second time.*

See Vol. I., p. 59.

At, etc. [*as in No. 6.*]

[*Title of cause as in No. 2.*]

The sheriff of the county of Saratoga having returned the alias attachment issued in this cause against the defendant C. D., "taken" returnable this day, together with the bond taken by him on the arrest of the said C. D.; and the said C. D. being now in open court called, and failing to appear; on motion of Mr. N., of counsel for the complainant, it is ordered that [*the said bond, being forfeited, may be prosecuted by the said complainant; and it is further ordered that*] a pluries attachment issue against the said C. D.; notailable, directed to the sheriff of said county of Saratoga, returnable immediately [*or, on the — day of — next*] before our chancellor, [*or vice-chancellor of the fourth circuit,*] wheresoever our said court shall then be.

## No. 22.

*Order for attachment against sheriff, for not returning an attachment.*

See Vol. I., p. 58.

[At, etc. [as in No. 6.]

[*Title of cause as in No. 2.*]

On reading and filing a copy of a pluries attachment issued against the defendant in this cause, for not answering the bill of complaint, directed to the sheriff of the county of Rensselaer, also on reading and filing an affidavit of W. C. N., from which affidavit it appears that the [\*VOL. II, 376] \*said attachment was delivered to the said sheriff, and that he had arrested the defendant thereon, and from a copy of the said attachment, that the same was made returnable at Saratoga Springs on the first Tuesday of August instant, and the said sheriff having neglected to return the said attachment, it is ordered on motion of Mr. N., of counsel for the complainant, that an attachment issue against V. R., the sheriff of Rensselaer county, directed to the corners of said county, and that the same be made returnable at the next motion term of this court, and that the said sheriff be not discharged from his arrest on such attachment on bail, or in any other manner, but by order of this court; and that an endorsement be made by the register upon such attachment accordingly, and stating the cause of issuing such attachment.

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 No. 23.

*Interrogatories for the examination of sheriff, under No. 22.*

[*Title of cause as in No. 2.*] Interrogatories to be exhibited on the part of the complainant for the examination of V. R., sheriff of the county of Rensselaer, pursuant to an order made in this cause on the thirteenth day of August, 1843.

*First interrogatory.* Did you, or not, receive an attachment issued in this cause and to you directed, tested on or about the 26th of April last, and returnable the second Tuesday (the 16th) of May last—with directions to attach the defendant above named? And if so, was or was not such attachmentailable? And did

you, or not, arrest the defendant thereupon, and make your return on the return day therein mentioned? Answer this interrogatory fully and particularly.

*Second interrogatory.* Did you, or not, on or about the twentieth day of May last, receive a letter from W. C. N., the complainant's solicitor, requesting you to return the aforesaid attachment? and did you, or not, reply to him the said N., in writing, by letter dated 24th of May last, acknowledging the receipt of said attachment, among other things? And did you not subsequently address another letter to the said N., on or about the 30th of May last, stating that the attachment in the above cause, is (was) returned to the register's office, Albany, "Non est?" Answer fully.

*Third interrogatory.* Did you, or not, on or about the fourth day of June last, receive an alias attachment issued in this cause, to you directed, and tested the 3d day of June and returnable the 20th [\*Vol. II, 377] day \*of said month, with directions to execute the same? And did you, or not, accordingly execute it? and if so, in what manner? Was there, or not, any bond taken upon such alias attachment? and did you, or not, return the same with such bond on the return day thereof, and bring the defendant before the court upon such return day, in compliance with such alias attachment? Answer fully.

*Fourth interrogatory.* Did you, or not, on or about the 14th July last past, receive a pluries attachment issued in this cause, tested the 13th day of July and returnable the 1st day of August, 1843, and to you directed, with instructions to execute the same? and was such attachmentailable or not? Did you, or not, comply with all the requisites of such attachment, and produce the defendant and have him before the chancellor on the return day thereof? and did you, or not, on or about the 26th of July last past, address a letter to W. C. N., the complainant's solicitor, in the words or to the purport and effect following, to wit: "W. C. N., Sir: I shall have the above named defendant in court on the return day of the writ, (1st day of August.) Troy, July 26, 1843. Respectfully yours, etc. V. R., sheriff Rensselaer co."? Answer this interrogatory fully and distinctly.

*Fifth interrogatory.* If you answer to the last interrogatory that you did address to the said N. the letter therein set forth, or one to the purport of such letter, then state the reason why you did not

make the return to such pluries attachment as therein directed, and produce the said defendant at the return day thereof, as promised in said letter; and state whether you were then or have been at any time and are still indemnified by said defendant, or by any person on his behalf, to prevent compliance with the requisites of such attachment, and make the return therein required; and if so, answer by whom, by name, and in what manner you have been so indemnified; and if not indemnified, state what arrangement, understanding or agreement, if any, you made with the defendant or any other person, or was made by him or any other person on your account or behalf, to prevent a compliance with the requisites of such attachment. State all the particulars thereof fully and explicitly; and answer fully, distinctly and particularly this interrogatory.

W. C. N., Solicitor and of  
counsel for complainants.

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\*No. 24.

[\*VOL. II, 378]

*Order for a habeas corpus on a return to an attachment that the party is already in custody.*

See Vol. I., p. 61.

At, etc. [*as in No. 6.*]

[*Title of cause, as in No. 2.*]

An attachment having heretofore issued in this cause against the defendant C. D. for not appearing therein, directed to the sheriff of the county of Saratoga, returnable on the — day of — instant; and the said sheriff having returned to the said writ that he had [*insert the return, given ante, p. 366;*] on reading the said attachment and the sheriff's return endorsed thereon, and on motion of Mr. N. of counsel for the complainant; it is ordered that a writ of *habeas corpus cum causis* do issue, directed to the said sheriff, ordering him to bring the said defendant forthwith before this court, at the town of Saratoga Springs, to answer for his said contempt.



## No. 25.

*Habeas corpus in pursuance of No. 24.*

The People of the State of New York, to the Sheriff of the [L. s.] county of Saratoga, greeting: We command you that you remove and bring the body of C. D., detained in the common jail of said county, in your custody, as it is said, under safe and secure conduct, together with the day and cause of his being taken and detained, by whatsoever name he may be called in the same, before our chancellor in our court of chancery at the town of Saratoga Springs, on the — day of — instant, [or forthwith] to answer for certain contempts wherewith he is charged, to do and receive what our said chancellor shall then and there consider of him in this behalf. And have you then and there this writ. And further that you detain the said C. D. at the place last aforesaid, until some order is made by our said chancellor, for his disposition.

Witness, etc. [as in No. 20.]

C. M., solicitor for complainant.

J. M. D., Register

[\*VOL. II, 379]

\**Endorsement on above writ.*

[Title of cause.]

C. M., Sol. for como't.

Habeas corpus.

Allowed by the court of chancery this — day of —, 1843.

R. H. W., Ch'r

*Sheriff's return to above writ.*

I return to this writ that the defendant C. D. is in my custody by virtue of a writ of *capias ad satisfaciendum* issued out of the supreme court of the state of New York at the suit of D. B., a copy of which writ is hereto annexed.

G. F., Sheriff.

## No. 26.

*Attachment with proclamations.*

See Vol. I., p. 62.

The People of the State of New York, to the Sheriff of the [L. s.] county of Saratoga, greeting: We command you on our behalf, to cause public proclamation to be made in all places within your bailiwick, wheresoever you shall think it most convenient,

that C. D. do upon his allegiance, on the —— day of —— instant, personally appear before us in our court of chancery, before our chancellor, wheresoever it shall then be, and nevertheless in the meantime, to attach the said C. D. if he can be found, so as to have his body before our chancellor, in our court of chancery, on the —— day of —— instant, wheresoever the said court shall then be, there to answer [*conclude as in No. 7.*]

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No. 27.

*Commission of rebellion.*

See Vol. I., p. 63.

The People of the State of New York, to G. Y., N. M., and [L. s.] R. L., greeting: Whereas, by public proclamations made on our behalf by the sheriff of the county of Saratoga in divers parts of that county, by virtue of our writ of attachment to him directed, C. D. has been commanded, upon his allegiance, personally [\*Vol. II, 380] to \*appear before the chancellor in our court of chancery, at a certain day now past, yet hath manifestly contemned our said command—now we command you, jointly and severally to attach the said C. D. or cause him to be attached, wheresoever he shall be found within our state, as a rebel and contemner of our laws, so as to have him or cause him to be before us in our said court on the —— day of —— next, wheresoever it shall then be, to answer unto us as well touching the said contempt, as also such other matters as shall be then and there objected against him; and further to perform and abide such order as our said court shall make in that behalf; and hereof fail not. We also hereby strictly command all and singular mayors, sheriffs, bailiffs, constables and other our officers and citizens that they by all proper means diligently aid and assist you, in all things in the execution of the premises. Witness [*conclude as in No. 7.*]

## No. 28.

*Order for sheriff acting as sergeant-at-arms.*

See Vol. I., p. 66.

At, etc. [*as in No. 6.*][*Title of cause, as in No. 2.*]

The defendant C. D. being in contempt for not appearing to the bill of complaint in this cause, and a commission of rebellion having been heretofore issued out of and under the seal of this court, directed to certain commissioners therein named, commanding them to attach the said C. D. as a rebel and contemner of the laws, and to have him before this court, on the — day of — instant; and the said commissioners having returned that they had made diligent search and inquiry after the said C. D. so as to attach his body by virtue of the said commission, but that notwithstanding all their endeavors they could not meet with him for that purpose; as by such commission and the return thereto appears. It is thereupon on motion of Mr. N., of counsel for the complainant, ordered that the sheriff of the county of Albany, now attending this court at its present term, and executing all the powers and duties of a sergeant-at-arms, do forthwith go and take the said C. D. into his custody, and him safely keep, and bring him immediately into this court, before the chancellor, to answer for his said contempt, and to do and receive what this court shall thereupon further order in the premises. And it is further ordered that the said sheriff do with all convenient speed, certify to this court, under his hand, his doings in the premises.

\*No. 29.

[\*Vol. II. 381]

*Warrant to sheriff acting as sergeant-at-arms, under No. 28.*

The People of the State of New York, to the Sheriff of the [L. s.] county of Albany, now attending this court at its present term, pursuant to the statute, and executing all the powers and duties of a sergeant-at-arms: In pursuance of an order made in our court of chancery, before our chancellor, on the — day of — last, in a certain cause depending in said court, wherein A. B. was complainant and C. D. defendant, directing you, as such sheriff, acting as

aforesaid, to forthwith go and take the said C. D. into your custody and bring him into said court of chancery to answer for his contempt, and to do and receive what the said court should thereupon further order in the premises: We command you, forthwith, to make diligent search after the body of the said C. D. and wherever you shall find him, to arrest and apprehend him and to bring him immediately into our said court of chancery, before the chancellor thereof, wheresoever the said court shall be, to answer for his said contempt; willing and requiring all mayors, sheriffs, justices of the peace, constables, and other officers and citizens, to be aiding and assisting you in the due execution hereof. And this shall be to you, or any of you that shall do the same, a sufficient warrant. Witness, etc. [*as in No. 7.*]

*Return to above warrant.*

In pursuance of the within warrant and the order therein mentioned, I have made diligent search and inquiry after the said C. D., but he doth so abscond and secrete himself that he cannot be found, to be apprehended.

R. F., Sheriff, acting as  
sergeant-at-arms.

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No. 30.

*Order for a sequestration.*

See Vol. I., p. 68.

At, etc. [*as in No. 6.*]

[*Title of cause.*]

The defendant C. D. being in contempt for not appearing to the bill of complaint in this cause, and a warrant having been issued to the [\*VOL. II, 382] sheriff \*of the county of Albany, attending this court at its present [or, *last January*] term, and as such, executing all the duties of a serjeant-at-arms, requiring him forthwith to go, and take the said C. D. into his custody and bring him into this court to answer for his contempt, in pursuance of an order of this court dated the — day of —; and the said sheriff, acting as serjeant-at-arms, having returned that he had made diligent search and inquiry after the said C. D., but that he did so abscond and secrete himself that he could

not be found to be apprehended, as by the said warrant and the return thereto appears; on motion of Mr. N., of counsel for complainant, it is ordered that a commission of sequestration do issue, against the said C. D. directed to G. Y., N. M., J. B., and R. L., commissioners, directing them to sequester the said defendant's personal estate, and the rents, issues, and profits of his real estate, until the said defendant shall appear to the bill of complaint in this cause, clear his contempt, and this court shall make an order to the contrary.

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No. 31.

*Writ of sequestration.*

See Vol. I., p. 68.

The People of the State of New York to G. Y., N. M., J. B., [L. s.] and R. L., greeting: Whereas A. B. lately exhibited his bill of complaint in our court of chancery against C. D. And whereas the said C. D. being duly served with a writ of subpoena issuing out of said court, commanding him under a certain penalty to appear to and answer the said bill, hath refused so to do, and thereupon all process of contempt hath regularly issued against him unto a sergeant-at-arms. And whereas the said C. D. hath of late absconded, and so concealed himself that the sheriff of the county of Albany attending this court at the present [*or last January*] term thereof, and executing the powers and duties of a sergeant-at-arms, hath not been able to find him, so that he could be apprehended, as by the certificate and return of the said sheriff appears: Know ye, therefore, that we, in confidence (\*) of your prudence and fidelity, have given, and by these presents do give, to you or any three of you, full power and authority to enter upon all the messuages, lands, tenements, and real estate whatsoever of the said C. D., and to take, collect, receive, and sequester into your hands not only all the rents and profits of the said messuages, lands, tenements and real estate, but also all his goods, chattels, [\*VOL. II, 383] and \*personal estate whatsoever; and therefore we command you; or any three of you, that you do, at certain proper and convenient days and hours, go to, and enter upon, all the messuages, lands, tenements and real estate of the said C. D., and that you do

collect, take, and get into your hands not only the rents and profits of all his said real estate, but also all his goods, chattels, and personal estate, and detain and keep the same under sequestration in your hands, or pay the same in such manner and to such persons as the said court shall appoint, until the said C. D. shall appear to [*or, fully answer*] the said complainant's bill, clear his contempts, and our said court shall make an order to the contrary. Witness, etc. [*as in No. 7.*]

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No. 32.

*Notice to tenants to attorn to sequestrators.*

See Vol. I., p. 71.

By virtue of a writ of sequestration issued out of and under the seal of the court of chancery of the state of New York, in a certain suit pending in said court between A. B., complainant, and C. D., defendant, to us directed and delivered as commissioners to execute the same, and which writ under the seal of said court is now shown to you, [*or, with a copy of which writ you are herewith served,*] you are hereby notified and required to attorn to us in future as your landlords of the premises in your occupation belonging to the said C. D.; and you are also notified and required to pay to us the arrears of rent now due from you respectively, as tenants of the said C. D.; and also to pay to us the rents which shall hereafter grow due from you, and each of you, on account of the said premises, from time to time as the same shall become due, until the further order of said court of chancery.

Dated this — day of —, 1843.

To

M. P.  
J. K., etc.  
Tenants of C. D.

G. Y.	} Commissioners.
N. M.	
J. B.	
R. L.	

## No. 33

*Affidavit to obtain order for tenants to attorn.*

See Vol. I., p. 71.

[Commence as in No. 2.] that on the — day of — instant, this deponent personally served upon Timothy Noakes, a tenant occupying [\*VOL. II, 384] \*a portion of the premises belonging to the defendant C. D., as his tenant, a notice of which a copy is hereunto annexed, by delivering the same to him, and at the same time showing to him the writ of sequestration therein mentioned, issued out of and under the seal of this court; and further that the said Timothy Noakes has not as yet attorned, or paid the rent due from him as such tenant, according to the requirements of such notice, to this deponent, nor to either of the other commissioners, to the knowledge or belief of this deponent.

## No. 34.

*Order directing tenants to attorn, etc. to commissioners.*

See Vol. I., p. 71.

At, etc. [*as in No. 6.*][*Title of cause.*]

A commission of sequestration having heretofore issued in this cause, directed to G. Y., N. M., J. B., and R. L., as commissioners, directing them to sequester the personal estate of the defendant C. D., and the rents, issues, and profits of his real estate, until the said C. D. should appear to the bill of complaint in this cause, clear his contempt, and the court should make an order to the contrary; and on reading and filing the affidavit of G. Y., one of the said commissioners, proving the service upon Timothy Noakes, one of the tenants of said C. D., of a notice requiring him to attorn to the said commissioners and to pay to them the rent then due or thereafter to grow due from the said Timothy Noakes on account of the said premises; and showing that the said Noakes had not complied with such notice; on motion of Mr. N. of counsel for the complainant, it is ordered that the said Timothy Noakes do attorn to the said commissioners, and pay to them the arrears of rent now due, and the rents which shall hereafter grow due from him on account of the said premises, from time to time as the same shall become due, until the further order of the court.

## No. 35

*Order for examination of claimant pro interesse suo.*

See Vol. I., p. 73.

At, etc. [*as in Na 6.*][*Title of cause.*]

A commission of sequestration having heretofore issued in this cause directed to G. Y., N. M., J. B., and R. L., as commissioners, directing [\*VOL. II, 385] \*them to sequester the personal estate of the defendant C. D., and the rents, issues and profits of his real estate, until the said C. D. should appear to the bill of complaint in this cause, clear his contempt, and the court should make an order to the contrary; under and by virtue of which commission the said commissioners have taken possession of a certain farm or lot of land, with the appurtenances, situate, lying and being in the town of Saratoga Springs, in the county of Saratoga, called the Baker lot, as part of the real estate of the said C. D., and then being in his actual possession, as appears by the return of the said commissioners to the said commission of sequestration; and it now appearing by the affidavit of John Doe, that he claims title to the said farm or lot of land, under and by virtue of a certain deed or conveyance thereof alleged by him to have been executed by the said C. D. to him, the said John Doe, and dated the — day of —, and the said John Doe, now applying for leave to be examined *pro interesse suo* before a master of this court touching his interest and title in the farm or lot of land so claimed by him; thereupon, on reading and filing the return of the said commissioners to the said commission of sequestration, and the affidavit of the said John Doe, and on motion of Mr. R. of counsel for the said John Doe, it is ordered that it be referred to one of the masters of this court residing in the county of Saratoga, to take the examination of the said John Doe *pro interesse suo*, and that within three days from the service of a copy of this order, the complainant in this cause exhibit before said master interrogatories for that purpose; that the master settle such interrogatories; that the said John Doe put in his examination thereto within twenty-four hours after such interrogatories are settled; and that if a replication to such examination is filed, the master may examine any other persons as witnesses touching such claim. And it is further ordered that the said master do certify whether the said John Doe hath made out a title to the said premises



so claimed by him, or any part thereof; and that the said John Doe procure and file such report within ten days from the date of this order, to the end that such further order may be made in the premises, as shall be iust.

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No. 36.

*Order for a distringas, to compel appearance of a corporation.*

See Vol. I., p. 75.

At, etc. [*as in No. 6.*]

[*Title as in No. 2.*]

On reading and filing an affidavit of E. F., proving the due service of the subpœna in this cause upon G. H., president of the Commercial [\*VOL. II, 386] \*Bank of Albany, on the — day of — instant, which subpœna was tested the — day of — last, and returnable on the — day of — instant, that such corporation is located in the city of Albany, and transacts its business there, and that the said G. H. resides in said city; and on reading and filing an affidavit of C. M. D., solicitor for the complainant, showing that no notice of an appearance by or on behalf of the said defendants has been received by him, and that no such appearance has been entered, to his knowledge or belief; on motion of Mr. N., of counsel for the complainant, it is ordered that a writ of distringas issue out of and under the seal of this court to compel the appearance of the defendants, the Commercial Bank of Albany, in this cause.

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No. 37.

*Distringas in pursuance of No. 36.*

The People of the State of New York, to the Sheriff of the [L. s.] county of Albany, greeting: We command you that you make a distress upon the lands and tenements, goods and chattels of the Commercial Bank of Albany, within your bailiwick, so that neither the said Commercial Bank, nor any other person or persons for them may possess them until our court of chancery shall make other order to the contrary; and that in the meantime you answer to us for what

you so distrain, so that the said Commercial Bank of Albany may be compelled to appear before us in our court of chancery, to answer to us as well touching a contempt which they, as it is alleged, have committed against us, as also such other matters as shall be laid to their charge; and further to perform and abide such order as our court shall make in this behalf. And that you make return of your doings in the premises.

Witness, etc. [*as in No. 7.*]

*Endorsed.*

Distringas.

By the court, for want of an appearance, [*or answer.*]

*Alias distringas.*

Same as above, except that after the words we command you—must be added—*as you were before commanded.*

*Pluries distringas.*

Same as No. 37, except the words—*as you were often before commanded*—are to be inserted after the words—*we command you.*

[\*VOL. II, 387]

\*No. 38.

*Sequestration to compel appearance of a corporation.*

See Vol. I., p. 76.

The People of the State of New York, to A. H., I. F., W. G., [L. s.] E. B., and C. E., greeting: Whereas A. B. lately exhibited his bill of complaint in our court of chancery, against the Commercial Bank of Albany, and caused a subpœna in said cause to be issued out of and under the seal of this court, and duly served upon the said Commercial Bank of Albany, which subpœna was tested on the — day of —, and returnable on the — day of —; and whereas the said Commercial Bank of Albany having neglected and refused to enter their appearance in said cause, a writ of distringas was thereupon issued against the said Commercial Bank of Albany,

directed to the sheriff of the county of Albany, requiring him to make a distress upon the lands and tenements, goods and chattels of the said corporation within his bailiwick, so that neither the said corporation nor any other person or persons for them might possess them until the court of chancery should make order to the contrary; and whereas further process of contempt has issued against the said corporation to compel its appearance in said cause, without effect, unto a pluries distringas, as appears by the said process and the returns thereto; know ye, therefore that we, in confidence [*conclude as in No. 31 from the asterisk (\*)*.]

## CHAPTER III.

## APPEARANCE.

## No. 39.

*Petition by infant for appointment of a guardian ad litem.*

See Vol. I., p. 83.

[*Title of cause.*]

To the Chancellor of the State of New York—

The petition of C. D. of the city of Utica, the [*or, a*] defendant in this suit, respectfully showeth that \* your petitioner is an infant over the age of fourteen years; to wit, of the age of fifteen years and [\*Vol. II, 388] \*upwards: That the bill in this cause was filed against your petitioner [*and others*] for the foreclosure of a mortgage alleged to have been executed by the father of your petitioner, (who is now deceased,) in his lifetime, to the complainant, and praying for a sale of the mortgaged premises. And your petitioner further shows that she claims an interest in the said mortgaged premises, as heir at law of her father; and that she has been served with a subpoena in said cause requiring her to appear and answer the said bill, returnable on the — day of — instant.

Your petitioner therefore prays that J. H. O., a solicitor of this court residing in the city of Utica, may be appointed the guardian ad litem of your petitioner, to appear and defend this suit on her behalf. And your petitioner will ever pray, etc.

*Consent of guardian.*

I hereby consent to become guardian ad litem of the above petitioner in the above entitled cause.

Dated, Utica, Nov. —, 1843.

J. H. O.

*Affidavit of signature.*

[*Title of cause.*]

Oneida county, ss: W. M. of said city, being duly sworn, deposeseth and saith that on the — day of — instant, he saw the above named C. D., to him personally known, sign the petition hereto annexed; and

that on the — day of — he also saw J. H. O., to him personally known, sign the consent to act as guardian ad litem thereunder written.

Sworn before me this  
day of —, 1843.

W M

*Certificate of vice-chancellor or master.*

I certify that I have examined into the circumstances of the within petition, and am of opinion that J. H. O., who is proposed in such petition as guardian ad litem of the petitioner, is a suitable and proper person to be such guardian ad litem; and that he has no interest in the suit in opposition to the interest of the petitioner.

Dated this — day of —, 1843.

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[\*VOL. II, 389]

\*No. 40.

*Order appointing guardian ad litem on petition of infant.*

At, etc. [as in No. 6.]

[*Title of cause.*]

On reading and filing the petition of C. D., the defendant in this suit, praying for the appointment of J. H. O., a solicitor of this court, as guardian ad litem for the said C. D., who is an infant above the age of fourteen, together with the consent of the said J. H. O. to act as such guardian ad litem, and the certificate of J. W., vice-chancellor of the fourth circuit, endorsed thereon, as to the fitness and capacity of the said J. H. O. to act as such guardian ad litem; on motion of Mr. N., of counsel for the defendant, it is ordered that the said J. H. O. be, and he is hereby appointed guardian ad litem of the said C. D., to appear and defend this suit in her behalf.

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No. 41.

*Petition by complainant for appointment of a guardian ad litem for an infant defendant.*

See Vol. I., p. 83.

[*Commence as in No. 3.*] The petition of A. B., the complainant in this suit, respectfully showeth, that the bill in this suit was filed

against the defendant to foreclose a mortgage executed by the father of said defendant (who is now deceased,) in his lifetime to your petitioner, and praying for a sale of the mortgaged premises; and that the said defendant claims an interest in the said premises as heir-at-law of her father. And your petitioner further shows that the said C. D. resides in the city of Utica, and is, as he is informed and believes, an infant over the age of fourteen years, to wit: of the age of fifteen years and upwards. And that on the — day of —, a subpœna in this cause was duly served on the said C. D. requiring her to appear to and answer the said bill, returnable on the — day of — last. (\*) And your petitioner further shows that although more than twenty days have elapsed since the appearance day mentioned in said subpœna no guardian ad litem hath as yet been appointed for such infant, or applied for by her or by any person on her behalf, to the knowledge or belief of your petitioner.

\*Your petitioner, therefore, prays that J. M. D., [\*Vol. II, 390] the register of this court, may be appointed guardian ad litem of such infant defendant, to appear and defend this suit in her behalf.

And your petitioner, etc.

[*Jurat, see Vol. I., p. 44.*]

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No. 42.

*Order for appointment of guardian ad litem, on petition of complainant.*

See Vol. I., p. 84.

At, etc. [*as in No. 6.*]

[*Title, as in No. 2.*]

On reading and filing the petition of the complainant in this cause, showing that the defendant C. D. is an infant over the age of fourteen years, to wit: of the age of fifteen years and upwards, and that a subpœna to appear and answer in this cause, returnable on the — day of —, has been duly served on the said C. D.; and that although more than twenty days have elapsed since the appearance day mentioned in the said subpœna, yet that no guardian ad litem hath been appointed for such infant or applied for by her, or by any person on her behalf; and praying for the appointment of J. M. D., the register of this court, as such guardian ad litem, to appear and

defend this suit in her behalf; on motion of Mr. N., of counsel for the complainant, it is ordered that the said J. M. D. be appointed such guardian ad litem, unless the said C. D. shall, within ten days after service of a copy of this order, herself procure a guardian ad litem to be appointed.

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No. 43.

*Order making last order absolute.*

See Vol. I., p. 84.

At, etc. [*as in No. 6.*]

[*Title of cause.*]

An order having been made in this cause on the — day of —, appointing J. M. D. the register of this court, guardian ad litem of the defendant C. D. unless the said C. D. should, within ten days after service of a copy of said order, herself procure a guardian ad litem to be appointed; on reading and filing an affidavit of A. P. proving the service of a copy of such order on the said C. D. personally on the — day of —, and on reading and filing the affidavit of C. M. D., [\*VOL. II, 391] \*complainant's solicitor, showing that more than ten days have elapsed since the service of the subpoena on the said C. D., yet that he has received no notice of the appointment of a guardian ad litem for such infant; on motion of Mr. N., of counsel for the complainant, ordered, that the said order be and the same is hereby made absolute.

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No. 44.

*Petition by a relative of infant for appointment of guardian ad litem.*

See Vol. I., p. 83.

[*As in No. 41—merely changing the name of the petitioner, and stating his relationship to the infant—down to the asterisk, (\*) then conclude.*]

Your petitioner, therefore, prays that he may be appointed guardian ad litem of such infant defendant to appear to and defend this and in

her behalf. And your petitioner further shows that he has no interest in this suit adverse to that of the infant, and is not connected in business with the solicitor or counsel of the complainant.

[*Jurat as in No. 39.*]

The above is the proper form where the person applying to be appointed is the general guardian of the infant. If the petition by a relative of the infant prays for the appointment of a solicitor, or master, etc. as guardian ad litem, the person proposed should make an affidavit, to be annexed to the petition, that he has no interest adverse to that of the infant, and that he is not connected in business with the complainant's solicitor or counsel.



## CHAPTER IV.

## PRECEDENTS OF PROCEEDINGS TO COMPEL AN ANSWER.

## No. 44a.

*Order to answer, or that bill be taken as confessed.*

See Vol. I., p. 87.

At, etc. [*as in No. 6.*]

[*Title, as in No. 2.*]

The defendant's appearance having been entered in this cause, on motion of Mr. N., of counsel for the complainant, ordered that the said [\*VOL. II, 392] \*defendant put in his answer to the bill in this cause and serve a copy thereof on the complainant's solicitor within forty days after service of a copy of said bill and notice of this order, or that said bill be taken as confessed by him.

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 No. 44b.

*Affidavit that discovery is necessary.*

See Vol. I., p. 87.

[*Commence as in No. 2.*] A. B., the complainant in this cause, being duly sworn, deposeth and saith that the appearance of the defendant C. D. has been entered in this cause, and notice thereof given to the solicitor of this deponent, as he is informed by said solicitor and verily believes to be true; and this deponent further saith that a discovery on oath is necessary in this cause, from the said defendant C. D., as he is advised by counsel and verily believes.

## 44c.

*Order to answer, or that an attachment issue.*

See Vol. I., p. 87.

At, etc. [*as in No. 6.*]

[*Title of cause.*]

On reading and filing an affidavit of the complainant in this cause showing that the appearance of the defendant C. D. has been entered in this cause and notice thereof served, and that a discovery on oath from the said defendant is necessary—on motion Mr. N., of counsel for the complainant, it is ordered that the said C. D. put in his answer to the bill of complaint filed in this cause and serve a copy thereof on the complainant's solicitor within forty days after service of a copy of such bill and notice of this order, or that in default thereof an attachment issue against him.

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No. 45.

*Affidavit of neglect to file answer*

[*Commence as in No. 2.*] C. M. D., solicitor for the complainant in this cause, being duly sworn, deposeth and saith that on the — day of — last past, he personally served upon W. A. B., solicitor for [\*VOL. II, 393] \*the defendant C. D., a copy of the bill of complaint in this cause, together with a notice that an order had been entered therein, requiring the said defendant to file his answer to said bill within forty days after such service, or that in default thereof an attachment would be issued against him; and this deponent further saith, that more than forty days have elapsed since the service of said bill and notice, yet this deponent hath not been served with a copy of the answer of the said C. D., nor hath any answer been put in by him, to the knowledge or belief of this deponent.

## No. 46.

*Order for attachment for not answering.*

See Vol. I., p. 87.

At, etc. [*as in No. 6.*][*Title, as in No. 2.*]

An order having heretofore been entered in this cause, requiring the defendant C. D. to put in his answer to the bill of complaint therein, and to serve a copy thereof on the complainant's solicitor within forty days after service of a copy of said bill and notice of said order, or that an attachment issue; on reading and filing due proof of the service of a copy of the bill of complaint and notice of such order, on the defendant's solicitor more than forty days since, and that the said C. D. hath not put in his answer to the bill in this cause, as required by said order; on motion of Mr. N., of counsel for the complainant, it is ordered that an attachment issue against the said C. D. for not answering.

## No. 47.

*Attachment for want of an answer.*

See Vol. I., pp. 87, 88.

The attachment for not answering is stated in Vol. I., p. 88, to be in the same form as the attachment for not appearing. The form of the latter writ is given in No. 7—ante, p. 365. The manner of endorsing and returning the writ is also described in that place.

[\*VOL. II, 394]

\*No. 48.

*Order for a sequestration for not answering.*

See Vol. I., p. 88.

At, etc. [*as in No. 6.*][*Title as in No. 2.*]

The defendant C. D. having, by an order of this court made on the day of —, been committed to the common jail of the county of

Saratoga, for his contempt in not putting in his answer to the bill of complaint in this cause, as directed by a previous order of this court; and it now appearing by the certificate of the sheriff of said county of Saratoga, that the said C. D. is still held by him in his custody by virtue of such commitment for his contempt, and it being shown by due proof by affidavit that the said C. D. hath not yet obeyed the order of this court directing him to put in his answer, but still persists in his contempt; on motion of Mr. N. of counsel for the complainant, ordered that a commission of sequestration do issue, directed to ——— commissioners, to sequester the personal estate, and the rents, issues and profits of the real estate of the said C. D., until he shall put in his answer to the bill of complaint in this cause, clear his contempt, and this court shall make an order to the contrary

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No. 49.

*Order for commitment, etc. upon attachment for want of an answer.*

At, etc. [as in No. 6.

[*Title as in No. 2.*]

The defendant C. D. having been arrested upon the attachment heretofore issued in this cause, returnable this day, [*and having given bail,*] and said defendant appearing in open court, and (\*) refusing to purge his contempt by filing his answer and paying the costs, it is ordered that a warrant issue to the sheriff of any county in this state, directing him to commit the said defendant C. D. to the common jail of the county, until he file his answer and pay the costs of said contempt, taxed at fifteen dollars. [*And it is further ordered, that the bond given by said defendant C. D., on his arrest be delivered to the complainant for prosecution.*]

If the defendant prays for time, the order will be as follows: [*As in the above to the asterisk, (\*) and then proceed as follows:*] praying for [\*VOL. II, 395] \*time to file his answer and pay the costs, and consenting that process of commitment may issue against him in case his said contempt is not purged within ten days; it is ordered, that said defendant C. D. do file his answer and pay the costs of said contempt, taxed at fifteen dollars, within ten days from the date of this order, and in default thereof, that, etc. [*as in the concluding part of the above.*]

## CHAPTER V.

## TAKING BILLS AS CONFESSED.

No. 50.

*Affidavit of service of subpoena.*

See No. 5, ante, p. 364.

No. 51.

*Order to take the bill as confessed for not appearing, where the subpoena has been personally served.*

See Vol. I., p. 91.

At, etc. [*as in No. 6.*][*Title as in No. 2.*]

On filing due proof of personal service of the subpoena issued in this cause, on all of the defendants, on or before the return day thereof, and more than twenty days having elapsed since said return day, and neither of said defendants having appeared; on motion of J. E., solicitor for complainant, it is ordered that the bill of complaint which is filed in this cause be and the same is hereby taken as confessed by all of said defendants.

No. 52.

*Order pro confesso where defendant is taken on an attachment, and being bailed, he fails to appear.* (See No. 11, ante p. 368.)

[\*VOL. II, 396]

\*No. 53.

*Order pro confesso where defendant appears personally on return of attachment, or is brought in by sheriff but refuses to enter his appearance.*  
(See No. 12, ante, p. 369.)

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No. 54.

*Affidavit to obtain order of publication, where defendant is a non-resident.*

See Vol. I., p. 92.

[*Commence as in No. 2.*] G. B. of Saratoga Springs in said county being duly sworn saith, that he is a clerk in the office of [*or, that he is*] the complainant's solicitor in this cause; that a subpœna to appear and answer has been duly issued out of and under the seal of this court, directed to the defendant C. D., but the same could not be served upon the said defendant by reason of (\*) his absence from this state; and that this deponent has been informed by S. T. of —, in the county of —, that the said defendant C. D. is a (†) non-resident of this state, and that he resides in the state of Illinois; and that the said C. D. never was a resident of this state, [*or, that the said defendant's last place of residence in this state was at —, in the county of —;*] which information this deponent believes to be true.

Sworn, etc.

G. B.

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No. 55.

*Affidavit to obtain an order of publication where defendant resides in this state but is absent therefrom, or from his place of residence, or is concealed.*

See Vol. I., p. 93.

[*Commence as in No. 2.*] G. B. of Saratoga Springs, in said county, being duly sworn saith that he is a clerk in the office of [*or, that he is*] the complainant's solicitor in this cause; that a subpœna to appear and answer has been duly issued out of and under the seal of this court, directed to the defendant C. D., but that the same could not be served

upon the said defendant by reason of the absence of the said C. D. from [or the concealment of the said C. D. within] this state, [or the con- [\*VOL. II, 397] tinued \*absence of the said C. D. from his place of residence.] And this deponent further says that the said defendant is an actual resident of this state, and that he resides at Troy, in the county of Rensselaer, where he has a family [or, where he boards with C. M.] (\*) And that [this deponent is informed by T. F. of Troy aforesaid, and believes that] the said C. D. left his said residence about the 1st of July last, to go to Washington, and has not yet returned, and is not expected to return until about the 1st day of June next.

N. B. If the order is applied for on the ground of the defendant's being concealed, the affidavit, after stating his residence as above, should also state the circumstances which induce a belief that the defendant is concealed—such as going to his house and finding it locked; or that his servants refuse admittance to those who inquire for him, although he is at home; or his being seen only at night; or his admissions to some person that he was concealing himself; or some other fact which will satisfy the court that he is actually concealing himself, or keeping out of the way, in order to avoid the service of the subpoena. And if applied for on account of his continued absence from his place of residence, it should state the length of such absence and the circumstances thereof, and the exertions which have been made to find him and serve the subpoena.

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No. 56.

*Affidavit to obtain order of publication where defendant's last known place of residence was in this state, but his present place of residence cannot be ascertained.*

See Vol. I., p. 92.

[As in No. 54 to the asterisk (\*)] this deponent's not being able to ascertain, on diligent inquiry, the present place of residence of the said defendant. And this deponent further saith, that the last known place of residence of the said C. D. was in this state, to wit, in the city of Albany, which place he left about — years ago, since which time this deponent has not been able to obtain any information as to his residence, although he has made inquiries of the former neighbors and acquaintances of the said C. D. and such of his known relatives as would be likely to be knowing to his present place of residence.

[\*VOL. II, 398]

\*No. 57.

*Order of publication for absent, concealed, or non-resident defendants.*

See Vol. I., p. 92.

At, etc. [as in No. 6.]

[Title as in No. 2.]

It satisfactorily appearing to this court that the defendant C. D. is a non-resident of this state, [or, is a resident of this state, but is now absent therefrom; or, from his place of residence; or, is concealed within the same for the purpose of avoiding the service of process; or, that the last known place of residence of the defendant C. D. was in this state, but that his present place of residence cannot be ascertained,] on motion of Mr. N. of counsel for complainant, it is ordered that the said defendant C. D. cause his appearance in this cause to be entered within — months from the date of this order; and that in case of his appearance he cause his answer to the complainant's bill to be filed, and a copy thereof to be served on the complainant's solicitor, within forty days after service of a copy of said bill and notice of this order, and in default thereof, that the said bill be taken as confessed by the said defendant C. D. And it is further ordered that within twenty days, the said complainant cause a notice of this order to be published in the state paper and in the Saratoga Sentinel; and that the said publication be continued in each of the said papers at least once in each week, for three weeks in succession; or that he cause a copy of this order to be personally served on the said defendant C. D., at least twenty days before the time above prescribed for his appearance.

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 No. 58.
*Petition for appointment of guardian ad litem for an infant after publication of an order to appear.*

See Vol. I., p. 95.

[Commence as in No. 39.] that on the — day of — last, an order was made in this cause requiring the defendant C. D., who is an infant under the age of twenty-one years, to appear and answer the bill of complaint in this cause, within — months from the date of said order.



And your petitioner further shows, that said order has been duly published, as directed therein, [*as will appear from the affidavits hereto* [\*Vol. II, 399] \*annexed;] but that the said C. D. has not appeared, nor caused a guardian ad litem to be appointed to defend this suit; nor hath any application for that purpose been made by or on behalf of said C. D. to the knowledge or belief of your petitioner.

Your petitioner therefore prays that — of —, a solicitor of this court, may be appointed the guardian ad litem of the said infant defendant, to appear and defend the interests of said infant in this suit.

[*Jurat.*]

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No. 59.

*Affidavit of publication of notice of order to appear.*

See Vol. I., p 94.

[*Commence as in No. 2.*] That he is the printer [*or foreman, or principal clerk, in the office of the printer,*] of the Saratoga Sentinel. That a notice of which the annexed is a copy, has been published in said paper once at least in each week, for three weeks in succession, commencing on the — day of — last.

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No. 60.

*Affidavit of defendant's non-appearance.*

See Vol. I., p. 95.

[*Commence as in No. 2.*] J. E., the solicitor for the complainant, being duly sworn deposeth and saith that he has not received any notice that an appearance has been entered in this cause by or on behalf of the defendant C. D., nor has the appearance of the said C. D. been entered to the knowledge or belief of this deponent.

## No. 61.

*Order taking bill as confessed, and directing a reference, after publication of notice of order to appear.*

See Vol. I., p. 94.

At, etc. [*as in No. 6.*]

[*Title as in No. 2.*]

On filing due proof of publication of notice of the order requiring the defendant C. D. to appear and answer the bill in this cause, [*or, [\*VOL. II, 400] on filing \*due proof of service of the order requiring the defendant C. D. to appear and answer the bill in this cause,*] and the time limited in said order having expired, and on reading and filing due proof that said defendant C. D. has not appeared; on motion of J. E., solicitor for complainant, it is ordered, that the bill of complaint, which is filed in this cause, be and the same is hereby taken as confessed by said defendant C. D. And it is further ordered that it be referred to one of the masters of this court residing in the county of Saratoga, to take proof of the facts and circumstances stated in said bill. And that the said master do examine the complainant on oath as to any payments that may have been made to him, or to any person for his use, on account of the demand mentioned in the bill in this cause, and which ought to be credited on such demand. And that the said master compute and ascertain the amount actually due to the complainant from the said defendant, including interest thereon to the date of his report. And that the said master report such proofs to the court; and also that he report upon the other matters hereby referred to him, with all convenient speed.

## CHAPTER VI.

## THE DEFENCE TO A SUIT.

No. 62.

*Order that complainant deliver copy bill.*

See Vol. I., p. 100.

At, etc. [*as in No. 6.*][*Title as in No. 2.*]

On reading and filing due proof that the appearance of the defendant has been entered in this cause, on motion of Mr. E. of counsel for said defendant, ordered that the complainant deliver a copy of the bill of complaint in this cause to said solicitor of the defendant within twenty days after service of notice of this order, or that in default thereof said bill be dismissed with costs.

[\*VOL. II, 401]

\*No. 63.

*Affidavit of non-delivery of bill.*[*Title of cause.*]

[*Commence as in No. 2.*] J. E., solicitor for the defendant C. D. being duly sworn, deposeth and saith, that on the — day of — last, he personally served upon C. M. D., solicitor for the complainant in this cause, a notice of the order of this court made on the — day of —, requiring him to deliver a copy of the bill of complaint in this cause within twenty days after such service; [*or, a notice, of which the annexed is a true copy,*] but that no copy of such bill has as yet been served upon this deponent.

## No. 64.

*Order dismissing suit for non-delivery of a copy of bill.*

At, etc. [as in No. 6.]

[*Title as in No. 2.*]

On reading and filing due proof of the service upon the complainant's solicitor, more than twenty days since, of notice of the order of this court, made on the — day of — last, requiring the complainant to deliver to the defendant's solicitor a copy of the bill of complaint in this cause within twenty days after service of such notice, or that in default thereof said bill be dismissed with costs, and that no copy of such bill has been served upon the defendant's solicitor; on motion, etc., ordered that the bill in this cause be dismissed with costs, to be paid by the complainant, for want of prosecution.

## No. 65.

*Exceptions to bill for scandal and impertinence.*

See Vol. I., p. 101.

Exceptions taken by C. D. defendant, [*impleaded with others*] to the bill of complainant of A. B. complainant, filed against him [*or them.*]

*First exception.*—For that the allegation in the 5th, 6th and 7th lines of the 3d folio of the said bill, in the words following, to wit: [\*Vol. II, 402] \*[*insert matter objected to*] is impertinent and ought to be expunged.

*Second exception.*—For that the allegation in the said bill commencing with the word “that” in the 1st line of the tenth folio and ending with the word “orators” in the 5th line of the 12th folio thereof, are scandalous and impertinent, and should be expunged.

In all which particulars the said defendant [*impleaded as aforesaid,*] humbly insists that the said complainant's said bill of complaint is irrelevant, impertinent and scandalous; wherefore the said defendant [*impleaded as aforesaid*] doth except thereto, and humbly prays that the impertinence and scandal of the said bill of complaint, excepted to as aforesaid, may be expunged with costs.

W. A. B., Solicitor for defendant.

W. W., of counsel.

## No. 66.

*Order for production of a paper by complainant.*

See Vol. I., p. 101.

At, etc. [*as in No. 6.*]

[*Title as in No. 2.*]

On reading and filing the petition of the defendant C. D., praying for the production and inspection of the deed mentioned in the complainant's bill as having been executed by T. S. M. to H. D., and dated the — day of —, and which is admitted by the complainant, in his bill, to be in his possession, before he shall be compelled to answer said bill; and on hearing Mr. N. in support of said petition, and Mr. E. in opposition thereto, it is ordered that the complainant do within ten days produce the said deed to the register [*or clerk*] of this court, and leave the same with him, for the inspection of the said defendant; and the said defendant be permitted to examine and inspect the same; and that he have twenty days' time to answer said bill after the said deed shall have been so produced.

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No. 67.

*Petition to obtain security for costs.*

See Vol. I., p. 102.

[*Commence as in No. 39, to the asterisk, (\*)*] he has caused his appearance to be entered in this cause, and notice thereof to be served on [\*Vol. II, 403] \*the complainant's solicitor. And your petitioner further shows that the complainant in this suit is a non-resident of this state, [*to wit, a resident of the state of —.*]

Your petitioner, therefore, prays that the said complainant may file security for the costs in this cause, within — days, or that his bill be dismissed with costs; and that in the meantime, and until such security is filed, all proceedings on the part of the complainant be stayed. And your petitioner, etc.

## No. 68.

*Order for security for costs.*At, etc. [*as in No. 6.*][*Title as in No. 2.*]

On reading and filing the petition of the defendant C. D., duly verified, [*and on reading and filing the affidavit of A. B. in opposition thereto,*] and on motion of Mr. N., of counsel for the defendant, [*and on hearing Mr. J. in opposition,*] ordered that the complainant in this cause do, within — days after service of notice of this order, give security for the payment of the costs that may be incurred by the defendant C. D. in this suit, by executing a bond to the said defendant in the penalty of \$——, with two sufficient sureties, to be approved of by the register [*or, a master,*] of this court and filed in his office, conditioned to pay, on demand, all costs that may be awarded to said defendant in this suit; and that such sureties justify if excepted to by the said defendant. And it is further ordered that if such security be not filed within the time above limited, the defendant may apply to dismiss the bill in this cause without further notice. And it is further ordered that all proceedings in this cause on the part of said complainant be stayed until such security be filed.

## No. 69.

*Bond for costs.*

[*As in No. 8, to the asterisk, (\*) except that it is made binding upon the sureties as well as the defendant, and is payable to the complainant, instead of the sheriff.*]

Whereas, by an order of the court of chancery of the state of New York, bearing date the — day of — last, made in a suit wherein [\*VOL. II, 404] \*the above named A. B. is complainant, and the above named C. D. defendant, it was ordered that the said A. B. should give security for the payment of the costs which might be incurred by the said C. D. in that suit, by executing a bond to him in the penalty of \$——, with two sufficient sureties, conditioned to pay, on demand, all costs that might be awarded to said defendant in said suit, as by such order will more fully appear. Now, the condition of this obligation is

such, that if the said A. B. shall well and truly pay, or cause to be paid to the said C. D., on demand, all costs that shall be awarded to him in the above mentioned suit, then this obligation to be void; otherwise to be and remain in full force and virtue.

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No. 70.

*Notice of filing bond for costs.*

[*Title of cause.*]

Sir:

You will please take notice that security for costs in this cause has this day been filed in the office of the register of this court—to wit, the bond of the complainant in the penalty of \$——, with J. B. and T. F. as sureties.

Dated ——, 1843.

To W. A. B., Esq., }  
Sol. for def't. }

Yours, etc.,  
C. M. D., Solicitor for complainant.

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No. 71.

*Notice of excepting to bond for costs.*

[*Title of cause.*]

Sir:

You will please take notice that the sufficiency of the sureties in the bond for costs filed in this cause, is excepted to.

To C. M. D., Esq., }  
Sol. for comp't. }

Yours, etc.,  
W. A. B., Solicitor for defendant.

[\*Vol. II, 405]

\*No. 72.

*Affidavit of justification by sureties in bond for costs.*

See Vol. I., p. 104

[*Commence as in No. 2.*] S. N., of the town of Saratoga Springs, merchant, and J. M., of the same place, hatter, being severally sworn

depose and say, and first the said S. N., for himself, saith that he is a resident of the town and county aforesaid, and a householder there, and that he is worth the sum of \$—— [*double the penalty of the bond*] over and above all just debts and responsibilities; and the said J. M., for himself, saith that he [*in same form as above.*]

Sworn, etc

S. N.

J. M.

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No. 73.

*General demurrer to whole bill, for want of equity.*

See Vol. I., p. 105.

The demurrer of C. D., defendant, to the bill of complaint of A. B., complainant.

This defendant, [or, *these defendants respectively,*] by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, (\*) doth [or, *do*] demur thereto, and for cause of demurrer showeth [or, *show*] (†) that the said complainant hath not, in and by said bill, made or stated such a cause as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for, from, or against this defendant [or, *these defendants* ;] wherefore this defendant [or, *these defendants*] demand the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

J. E., Solicitor for defendant.

W. H., of counsel.

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[\*VOL. II, 406]

\*No. 74.

*Demurrer to part of bill only.*

See Vol. I., p. 106.

[*As in No. 73 to the asterisk (\*)*] as to so much and to such parts of the said bill as seeks that this defendant may answer and set forth



whether, etc. ; and whether, etc. ; and prays [*if relief be prayed*] doth demur, and for cause of demurrer sheweth that [*state causes of demurrer.*] Wherefore, and for divers other errors and imperfections appearing in the said bill, the defendant prays the judgment of this honorable court whether he shall be compelled to make any answer to such part of the said bill as is so demurred unto as aforesaid, and prays [*as in No. 73.*]

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No. 75.

*Demurrer for want of parties.*

[*As in No. 73 to the (t)*] that it appears by the said complainant's said bill, that J. M. therein named is a necessary party to said bill ; inasmuch as it is therein stated that E. M., the testator in the said bill named, did in his lifetime, by certain conveyances made to the said J. M., in consideration of the sum of \$—, convey to him, by way of mortgage, certain estates in the said bill particularly mentioned and described, for the purpose of paying the said testator's debts and legacies ; but the said complainant hath not made the said J. M. a party to the said bill. Wherefore [*as in No. 73.*]

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No. 76.

*Demurrer for multifariousness.*

[*As in No. 73. to the (t)*] that it appears by the said bill that the same is exhibited by the said complainant against this defendant and T. M. W. P. and N. W., as defendants thereto, for several distinct matters and causes, in many whereof, as appears by the said bill, this defendant is in no way interested ; and, by reason of such distinct matters, the said bill is drawn out to a considerable length, and this defendant is compelled to take a copy of the whole thereof ; and by joining distinct matters together which do not depend on each other, the proceedings in the progress of the said suit will be intricate and [*\*Vol. II, 407*] prolix, and this defendant \*put to unnecessary charges and expenses, in matters which in no way relate to or concern him. Wherefore [*as in No. 73.*]

## No. 77.

*Demurrer coupled with an answer.*

See Vol. I., p. 108.

## IN CHANCERY.

Before the Chancellor.

The joint demurrer of the defendants C. D. and E. F., defendants, to part, and their joint and several answers to the residue of the bill of complaint of A. B., complainant.

[*Proceed as in No. 73 to the asterisk (\*)*, then *pursue No. 74*] and as to the residue of the said bill, these defendants, not waiving their said demurrer, but relying thereon, and saving and reserving to themselves now, and at all times hereafter, all and all manner of benefit and advantage of exception which can or may be had to the residue of the said bill of complaint, for answer thereto, or to so much thereof as these defendants are advised is in any wise material or necessary for them to answer unto, answer and say, that etc.

## No. 78.

*Plea.*

See Vol. I., p. 114.

## IN CHANCERY.

Before the Chancellor.

The plea of C. D. the defendant to the bill of complaint of A. B. complainant.

This defendant [or, *these defendants respectively*] by protestation not confessing or acknowledging all, or any, of the matters and things in the said complainant's bill of complaint mentioned and contained to be true, in such sort, manner and form as the same are therein set forth and alleged, for plea to the whole of the said bill [or, *to so much and such part of the said bill as prays, etc. or seeks (\*) a discovery from this defendant whether, etc.*] says that (†) etc. Therefore this defendant doth plead the said [*act of the legislature, want of proper parties, or* [\*VOL. II, 408] *release, etc. in bar*] \*to the said complainant's bill [or,

to so much of the said bill as is hereinbefore particularly mentioned]; and prays the judgment of this honorable court whether he should be compelled to make any further answer to the said bill [or, to so much of the said bill as is hereinbefore pleaded to]; and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

C. M. D., Solicitor for defendant.  
J. E., of counsel.

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No. 78a.

*Plea of former suit pending.*

[As in the last form to the (f) ] on the — day of —, in the year 1842, the said present complainant exhibited his bill of complaint in this honorable court against this defendant and one T. Y., for an account of the moneys raised by the sale of the said farm and personal property in the said complainant's present bill mentioned, and claiming such shares and proportions thereof, and such rights and interests therein as he now claims by his present bill; and praying relief against this defendant in the same manner, and for the same matters, and to the same extent, as the said complainant now prays by his said present bill; and this defendant and the said T. Y. appeared and put in their answer to the said former bill, and the said complainant replied thereto, and witnesses were examined on both sides, and the said former bill and the several proceedings in the said former cause, as this defendant avers, now remain depending and as of record in this honorable court, the said cause being yet undetermined and undismissed; all which said several matters and things this defendant doth aver, and pleads the said former bill, answer, and the several proceedings in the said former suit, in bar to the said complainant's present bill; and demands the judgment of this honorable court whether he shall be put to make any further or other answer thereto; and prays to be hence dismissed with his costs and charges in this behalf sustained.

## No. 79.

*Plea of want of proper parties.*

[As in No. 78 to the asterisk (\*)] an account from this defendant as executor and heir at law of H. D. deceased, in the said bill named, for what remains due and owing upon the bond in the said bill mentioned, [\*Vol. II, 409] bearing date the — day of —, 1840, and payment by this defendant, as such executor and heir at law of the said H. D. deceased, of what shall be found due on taking such account, this defendant doth plead thereto, and for plea saith that no part of the sum of \$2,000, for securing the repayment whereof the said bond was executed, was paid to or received by the said H. D., but that the whole was paid unto A. H., in the said bond and in the said bill also named, and received by him for his sole use, and that the said H. D. was only a surety for the said A. H., and that the said complainant afterwards accepted a composition for what he alleged to be due on the said bond, from the said A. H., without the privity of the said H. D. in his lifetime, or of this defendant since the death of the said H. D., which took place on or about the — day of —, as in the said bill mentioned, since which no demand has been made on this defendant for any money alleged to be due on the said bond; and that the said A. H. died several years ago seized and possessed of considerable real and personal estate; and that his heir at law, or the devisee of his real estate, and also the representative of his personal estate, ought to be, but are not, made parties to the said bill. Therefore [conclude as in No. 78.]

## No. 80.

*Plea coupled with an answer.*

Is the same, *mutatis mutandis*, as a demurrer coupled with an answer. See No. 77.

## No. 81.

*Replication to plea.*

See Vol. I., p. 119.

Is the same as the replication to an answer, which will be given hereafter, with the variation of substituting the word "plea" for "answer," wherever the latter word occurs

[\*Vol. II, 410.]

## \*No. 82.

*Order of reference of plea of former suit pending.*

See Vol. I., p. 125.

At, etc. [*as in No. 6.*][*Title as in No. 2.*]

On filing a plea in this cause averring that there is a former suit depending in this court for the same matters as are involved in the present suit, and on motion of Mr. D., of counsel for the defendant, ordered that it be referred to one of the masters of this court residing in the county of S., to look into the bill and the plea in this cause, and the bill in the said plea alleged to have been exhibited by the complainant against the defendant previous to the commencement of this suit, and into the other pleadings and proceedings therein, and to report whether the said plea is true.

## No. 83.

*Order directing plea to stand for an answer.*At, etc. [*as in No. 6.*][*Title of cause.*]

The plea of the defendant C. D. to the bill of complaint in this cause having heretofore come on to be argued, and counsel on both sides having been heard thereupon, it is ordered that the said plea do stand for an answer, with liberty to the complainant to except thereto.

## No. 84.

*Answer to a bill brought by an infant against executors for a legacy.*  
(See No. 1.)

See Vol. I., p. 140.

## IN CHANCERY.

Before the Chancellor.

The joint and several answers of C. D. and E. F., [*two of the*] defendants to the bill of complaint of A. B., an infant, by J. B., his father and next friend, complainant.

\*These defendants now and at all times hereafter [\*VOL. II, 411] saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as these defendants are advised is material for them to make answer unto, they answer and say, (\*) they admit that J. S., in the complainant's bill named, did duly make and execute such last will and testament, in writing, of such date, and to such purpose and effect, as is in the complainant's said bill of complaint mentioned and set forth, and did thereby bequeath to the complainant A. B. such legacy of five hundred dollars, in the words for that purpose mentioned in the said bill, or words to a like purport or effect.

And these defendants further answering say, that they admit that the said testator died on or about the 25th day of October, 1842, without revoking or altering the said will. And these defendants further answering admit that they, these defendants, sometime afterwards, to wit, on or about the first day of November, 1842, duly proved the said will before Moses Patten, the surrogate of the county of Albany, and took upon themselves the burthen of the execution thereof. And these defendants are ready to produce the said probate as this honorable court shall direct.

And these defendants further answering admit, that the said complainant A. B., by his said father and next friend, did several times since the said legacy of five hundred dollars became payable, apply to these defendants, to have the said legacy paid or secured for the benefit of the said complainant, which these defendants declined by reason that the said complainant was, and still is, an infant, under the age of twenty-one years—wherefore these defendants could not, as they are

advised, be safe in making such payment, or in securing the said legacy, in any manner, for the benefit of the said complainant, except by the order and direction and under the sanction of this honorable court.

And these defendants further answering say, that by virtue of the said will of the said testator, they possessed themselves of the real and personal estate, goods, chattels, and effects of the said testator, to a considerable amount; and do admit that effects of the said testator are come to their hands sufficient to satisfy the complainant's said legacy, and which assets they admit to be subject to the payment thereof, and are willing and desirous, and do hereby offer to pay the same as this honorable court shall direct, being indemnified therein.(†) And these defendants deny all unlawful combination and confederacy in the said bill charged; without this, that any other matter or thing material or [\*VOL. II, 412] necessary \*for these defendants to make answer unto, and not herein or hereby well or sufficiently answered unto, confessed or avoided, traversed or denied is true, to the knowledge or belief of these defendants. All which matters and things these defendants are ready to aver, maintain, and prove, as this honorable court shall direct; and humbly pray to be hence dismissed, with their reasonable costs and charges in that behalf most wrongfully sustained.

C. D.

C. M. D., Solicitor for defendant.

J. E., of counsel.

[*Jurat.* See Vol. I., p. 44, and Rule 18.(a)]

#### TITLES OF ANSWERS.

*By an infant.*] The answer of C. D., an infant under the age of twenty-one years, by J. E., his guardian, [*one of the*] defendant [*s*] to the bill of complaint of A. B. complainant.

*By a single defendant.*] The answer of C. D. defendant, to the bill of complaint of A. B. complainant.

*Joint answer by adults and infants.*] The joint and several answer of P. H. and R. his wife, and of D. V. and C. R., infants, under the age of twenty-one years, by G. M. D., their guardian, defendants to the bill of complaint of A. B. complainant.

*Where the bill misstates the names of defendants.*] The joint and several answer of J. D., in the bill called W. D., and of C. F., in the bill

(a) A joint answer, by several defendants, it seems, should have a special jurat, in all cases, where one defendant states facts which are not known to the other; so that neither defendant shall be made to swear to matters of which he has no knowledge.

called G. F., defendants, to the bill of complaint of A. B. complainant.

*By husband and wife.*] The joint answer of C. D. and S. his wife, defendants, etc.

*By a lunatic or idiot.*] The joint answer of C. D. a lunatic, [or, *idiot, or an habitual drunkard,*] by J. T. his guardian ad litem, and J. T. committee of the said C. D., defendants to the bill of complaint, etc.

## COMMENCEMENTS OF ANSWERS.

*Joint answer.*] These defendants [*as in No. 84 to the asterisk(\*)*] each answering for himself, and not the one for the other, jointly and severally answer and say, that, etc., and these defendants deny all, etc.

*By an infant.*] This defendant answering by his said guardian saith that he is an infant of the age of — years or thereabouts, and he therefore submits his rights and interests in the matters in question in this cause to the protection of this honorable court; without this, that, etc.

*\*By a formal party, who is a stranger to the facts.*] [\*VOL. II, 413] This defendant, saving and reserving to himself, etc, [*as in No. 84.*] answers and says that he is a stranger to all and singular the matters and things in the said complainant's bill of complaint contained, and therefore leaves the complainant to make such proof thereof as he shall be able to produce; without this, that, etc.(a)

## CONCLUSIONS OF ANSWERS.

*Where party claims the same benefit of defence as if the bill had been demurred to for want of equity.*] And this defendant submits to this honorable court that all and every of the matters in the said complainant's bill mentioned and complained of are matters which may be tried and determined at law, and with respect to which the said complainant is not entitled to any relief from a court of equity; and this defendant hopes he shall have the same benefit of this defence as if he had demurred to the said complainant's bill. And this defendant denies, etc.

(a) This is the usual answer of the attorney-general.



## No. 85.

*Order to take answer without oath, or signature.*

See Vol. I., pp. 142, 143.

At, etc. [*as in No. 6.*]

[*Title as in No. 2.*]

On reading and filing the written consent of J. E., solicitor for the complainant, that the answer of the defendant C. D., to the bill in this cause be taken without oath, [or, *the signature of said C. D.*] and on motion of Mr. F., solicitor for the said defendant, ordered that the answer of the said defendant may be put in without oath [or, *being signed by the said C. D.*]

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 No. 86.

*Petition of wife for leave to answer separately from her husband.*

See Vol. I., pp. 150, 151.

[*Commence as in No. 39.*] The petition of the defendant S. D., wife of the defendant C. D., respectfully showeth,

That the complainant in this suit has filed his bill in this court [\*Vol. II, 414] against \*your petitioner and her said husband, praying in substance [*insert prayer of bill;*] that your petitioner has appeared to said bill; and that her said husband resides out of the jurisdiction of this court; [or, *has left your petitioner and lived separate from her for upwards of — years last past, and that he now lives separate and apart from her.*]

Your petitioner therefore prays that she may be authorized, by an order of this court, to put in her answer to the said bill, without her said husband.

S. D.

C. M. D., Solicitor and of }  
 counsel for petitioner. }

## No. 87.

*Order for wife to answer separately.*

At, etc. [*as in No. 6.*]

[*Title of cause.*]

On reading and filing the petition of S. D., wife of the defendant C. D., praying for leave to put in her answer in this cause without her husband; and on motion of Mr. D. of counsel for said petitioner, ordered that the said S. D. be at liberty to put in her answer in this cause separate from her said husband.

## No. 88.

*Petition for an interpreter to take the answer of a foreigner.*

See Vol. I., p. 154.

[*Commence as in No. 39.*] The petition of A. B., the complainant in this cause, respectfully showeth, That the defendent C. D. has entered his appearance in this cause, that the said C. D. is a foreigner, to wit, a native of France, and that he is not sufficiently versed in the English language to answer in that tongue.

And your petitioner further showeth, that he is informed by his solicitor, and believes, that the said C. D. has not as yet applied to this court for an order appointing an interpreter to enable him to put in his answer to the bill in this cause, to the knowledge or belief of such solicitor.

Your petitioner therefore prays, that —, of, etc., may be appointed an interpreter, for the purpose of enabling the said C. D. to answer said bill of complaint.

[\*VOL. II, 415]

\*No. 89.

*Order appointing an interpreter.*

At, etc. [*as in No. 6.*]

[*Title as in No. 2.*]

On reading and filing petition of the complainant in this cause, and on motion of Mr. N. of counsel for said complainant, ordered that —

of, etc., be and he is hereby appointed an interpreter to enable the said C. D. to put in his answer to the bill of complaint filed in this cause.

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## No. 90.

*Oath of interpreter to the answer of a foreigner.*

[*Title of cause.*]

T. F., of the city of Albany, being duly sworn, deposeth and saith, that he is well acquainted with the French and English languages, and that he hath truly and correctly read over and translated to the defendant the bill of complaint in this cause, and that he has also read over to the defendant the translation in the French language of the answer of the said defendant in English, hereto annexed; and that the same is a correct translation of the English into the French language; and that the same is true and just, to the best of his ability; which said answer in French is also hereto annexed.

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## No. 91.

*Jurat to answer of a foreigner.*

The defendant C. D. being a foreigner, and unacquainted with the English language, was, on this — day of —, 1843, sworn to the above answer by the interpretation of —, (who was duly appointed for that purpose, and who was previously sworn by me truly to interpret the same;) and being so sworn, the said C. D. did say that the matters contained [*as in the ordinary jurat.*]

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[\*VOL. II, 416]

\*No. 92.

*Jurat to answer of an illiterate person.*

See Vol. I., p. 155.

The defendant C. D. not being able to read or write, G. H., the solicitor for the said defendant, was

sworn that he had read to the said defendant truly and correctly, the above answer, and that he appeared perfectly to understand the same; and that the said C. D. had affixed his mark thereto in his presence; and the said C. D. was thereupon sworn that he had heard the said answer so subscribed by him with his mark, read, and knows the contents thereof, [*conclude as in the ordinary form.*]

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## No. 93.

*Affidavit to obtain a commission to take defendant's answer.*

See Vol. I., p. 160.

[*Commence as in No. 2.*] John Jones, the solicitor for the defendant C. D., being duly sworn, says that the bill in this cause was filed against the defendant C. D. [*and others*] to foreclose a mortgage; and that the appearance of the said C. D. has been entered in this cause and notice thereof served on the complainant's solicitor. And further, that the said C. D. resides out of the state, to wit, at Cleveland in the state of Ohio.

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## No. 94.

*Order for commission to take answer abroad.*

At, etc. [*as in No. 6.*]

[*Title as in No. 2.*]

On reading and filing due proof that the defendant C. D. has appeared to the bill in this cause, and that he resides at Cleveland in the state of Ohio: on hearing Mr. G. H., solicitor for the said defendant, and Mr. W. A., solicitor for the complainant, [*or, on reading notice of this motion and proof of due service thereof on complainant's solicitor*] it is ordered that a commission-issue to Cleveland aforesaid, to take the answer of the said C. D. in this cause; and that such com- [\*VOL. II, 417] mission be directed \*to A. C. and T. S. on the part of the said defendant, and to J. M. and F. W. on the part of the com-

plainant. And it is further ordered that the said C. D. cause the said commission to be executed and returned within ——— months from the date of this order.

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No. 95.

*Commission to take answer*

The People of the State of New York, by the grace of [L. s.] God free and independent. To A. C., T. S., J. M. and F. W., of Cleveland, in the state of Ohio, or any two of them, greeting: Whereas A. B. has exhibited his bill of complaint before us, in our court of chancery, against C. D. [*who is impleaded with others*]; and whereas we have, by our writ, commanded the said C. D. to appear before us in our said court of chancery, at a certain day, to answer to the said bill: Know ye, that we have given unto you, or any three or two of you, full power and authority, at such a day and place as you shall think fit, to go to the said C. D. if he cannot conveniently come unto you, and take his answer to the said bill, and take his corporal oath, to be administered by you, or any three or two of you, to the said answer, the same being read and distinctly written on paper; and when you shall have so taken it, you are to send the same, closed up under your seals, or the seals of any three or two of you, unto us in our said court of chancery, without delay, wheresoever it shall then be, together with this writ. Witness Reuben H. Walworth, chancellor of the state of New York, on the ——— day of ———, in the year of our Lord one thousand eight hundred and forty-three.

J. M. D., Register.

G. H., Solicitor for defendant.

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No. 96.

*Instructions to commissioners on a commission to take an answer.*

[*Title as in No. 2.*]

Instructions to the commissioners appointed to take the answer of C. D., one of the defendants.

The commissioners on the part of the defendant named in the accompanying commission must give six days' notice in writing to the

commissioners on the part of the complainant, of the time and place of executing the commission. Such notice may be in the following form: [\*VOL. II, 418] \*[*Title of the cause.*] “Gentlemen: You are hereby notified that the commission issued out of the court of chancery of the state of New York, in the above entitled cause, directed to yourselves and the subscribers, and authorizing us, or any three or two of us, to take the answer of C. D., the defendant therein, will be executed at the Cleveland Hotel, kept by N. Y., on the — day of — instant, at ten o'clock in the forenoon.

To J. M. and F. W., commission- }      A. C., }  
ers named in said commission. }      T. S., } Commissioners.”

On the day appointed, the commissioners are to meet at the place specified in the notice, attended by the defendant C. D. If only one attends on each side, it will be sufficient; but in case neither of the commissioners named by the complainant attends, it is necessary that both of those named by the defendant should be present, because the answer cannot be taken unless two at least attend.

If the commissioners of one party only attend, they may, after waiting until six o'clock in the evening, proceed to take the answer, but not before.

When the commissioners are ready to proceed, the answer being produced, together with the defendant, and the commission having been opened, one of the commissioners will interrogate the defendant as follows: “Have you heard this your answer read? Do you know the contents thereof? And do you exhibit it as your answer to the bill of complaint of A. B.?” If the defendant answers in the affirmative, he must sign his answer, and the following oath is then to be administered to him by one of the commissioners: “You do swear [or, *affirm*] that you have read [or, *heard read*] this your answer, subscribed by you, and that you know the contents thereof, and that the same is true of your own knowledge, except as to the matters which are therein stated to be upon your information and belief, and that, as to those matters, you believe it to be true.”

Immediately below the signature of the defendant, the following jurat is to be written, and signed by the commissioners:

The defendant C. D., on the — day of —, 1843, appeared before us and answered that he had read [or, *heard read*] the foregoing answer; and he signed the same in our presence, and was thereupon sworn [or, *affirmed*] before us, that he had read [or, *heard read*] the said answer, and knew the contents thereof; and that the same was

true of his own knowledge, except as to the matters which are therein stated to be on his information and belief, and that, as to those matters, he believed it to be true.

The answer, jurat, (and schedules, if any,) are then to be annexed [\*VOL. II, 419] to \*the commission; and the *return* must be endorsed upon the commission, as follows: The execution of this commission appears in a certain schedule [or, *schedules*] hereto annexed.

A. C. }  
T. S. } Commissioners."  
J. M. }

Their return must be signed by two of the commissioners at least.

The commission, together with the schedules and these instructions, must then be tied up together and enclosed in an envelope; which must be sealed by the commissioners and directed to John M. Davison, register of the court of chancery, Albany—the name of the commissioners being also written upon the outside of the envelope, opposite the seals.

If the commission cannot be brought to the office of the register by one of the commissioners, it should be delivered by the commissioners to a messenger, who will bring the same; and who will be required to swear that he received it from one or more of the commissioners, and that it has not been opened or altered since he so received it. Or the commission may be returned by mail; in which case a receipt should be endorsed upon the envelope, by the postmaster, acknowledging that he has received it from one of the commissioners.

E. J., Solicitor for defendant.

If the complainant does not join in the commission, of course that part of the instructions which relates to notice to the commissioners named by him will be omitted.

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No. 97.

*Mode of swearing to and authenticating answers taken in another state.*

See Vol. I., pp. 145, 146, 160.

Attach to the answer the ordinary jurat, (which is given, Vol. I., p. 44,)—changing the name of the state and county—and let the officer

before whom the answer is sworn to, sign it, as in other cases. Then add the following certificate :

STATE OF [ILLINOIS. }  
[Hancock] County, } ss.

I, W. W., chief justice [or, *one of the associate justices*] of the supreme court of said state of Illinois, do certify that on this — day of —, 1843, the above defendant C. D. subscribed and took the above answer before me, and was sworn to the oath hereto annexed, at the town of Springfield in said state.

W. W.

\*STATE OF [ILLINOIS.] }  
— County, } ss.

[\*VOL. II, 420]

I, J. C., clerk of the supreme court of the state of Illinois, do certify that the honorable W. W. is chief justice [or, *one of the associate justices*] of the said court, and that he was so at the date of the annexed certificate; that I am well acquainted with the hand-writing of the said W. W., and that the signature of "W. W.," subscribed to such certificate, is the genuine signature of the said W. W. And I further certify that the said supreme court is a court of record in actual existence, and known and duly recognized under the constitution and laws of said state.

In testimony whereof, I have hereunto set my hand, and [L. s.] affixed the seal of the said supreme court, this — day of —, 1843.

J. C., Clerk.

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No. 98.

*Disclaimer.*

See Vol. I., p. 170.

IN CHANCERY.

Before the Chancellor.

The answer and disclaimer<sup>(a)</sup> of C. D., defendant to the bill of complaint of A. B. complainant.

[A disclaimer being, in point of form, an answer, the words of course at the commencement of the latter (see No. 84) are to be pursued in

(a) In general, a disclaimer cannot be put in alone. The form of a disclaimer alone seems to be simply an assertion that the defendant disclaims all right and title to the matter in demand; and in some instances, from the nature of the case, would be sufficient; but the forms in the books of practice are all of an answer and disclaimer. See Willis' Eq. Pl. 615 n.; Mitf. 257; 2 Newl. Pr. (2d ed.) 145; 2 Harr. Pr. 587.



the former. After which the defendant's answer to the bill must be inserted with the exception of the formal conclusion. Then add the disclaimer, as follows:]

And this defendant further answering says, that he never had or claimed, or pretended to have, nor has he now, nor does he claim or pretend to have, any right, title, or interest of, in, or to the said bond and mortgage, or in and to the moneys due thereon or secured thereby, or to the said mortgaged premises or any part thereof, or [\*VOL. II, 421] \*to the equity of redemption in the same, or any part thereof. And this defendant disclaims all right and title of, in, or to the same, and every part thereof.

And this defendant denies all, etc. [*concluded as in No. 84.*]

## CHAPTER VII.

## PROCEEDINGS ON THE PART OF THE COMPLAINANT TO REPLYING.

No. 99.

*Exceptions to answer for insufficiency.*

See Vol. I., p. 176.

[*Title of cause.*]

Exceptions taken by the said complainant to the answer put in by the defendant C. D. to the said complainant's bill of complaint.

*First exception.*—For that the said defendant C. D. hath not, to the best and utmost of his knowledge, remembrance, information, and belief, answered and set forth whether [*set forth the interrogatory in the bill which is not answered, in hæc verba.*]

*Second exception.*—For that the said defendant C. D. hath not, in manner aforesaid, answered and set forth whether, etc. [*as before.*]

In all which particulars the answer of the said defendant C. D. is, as the said complainant is advised, imperfect, insufficient and evasive; and the said complainant therefore excepts thereto, and prays that the said defendant C. D. may put in a further and better answer to the said bill of complaint.

J. E., Solicitor and of  
counsel for complainant.

[\*Vol. II, 422]

\*No. 100.

*Order for answer on submission to exceptions.*

See Vol. I., pp. 185, 193.

At, etc. [*as in No. 6.*][*Title as in No. 2.*]

The defendant C. D. having filed his written submission to the second and third exceptions for insufficiency, taken by said com-

plainant to the answer of said defendant C. D., and [*the rest of such exceptions having been abandoned—or, the rest of such exceptions having been disallowed*] on motion of O. R., solicitor for complainant, it is ordered, that the said defendant C. D., put in a further answer to the said second and third exceptions within twenty days after notice of this order, and pay the costs of such exceptions, or that the bill of complaint which is filed in this cause be taken as confessed by said defendant C. D. [*or, that an attachment issue against said defendant C. D.*]

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No. 101.

*Order of reference when defendant does not submit to answer exceptions.*

See Vol. I., p. 186.

At, etc. [*as in No. 6.*]

[*Title as in No. 2.*]

Exceptions for insufficiency having been filed to the answer of the said defendant C. D., on the — day of — last, and the said C. D. not having submitted to answer said exceptions; on motion of O. R., solicitor for complainant, it is ordered, that it be referred to P. G. E., one of the exception masters of this court, to look into said bill, the answer of said defendant C. D., and such exceptions, and report whether said exceptions are well taken or not.

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No. 102.

*Master's report upon exceptions to answer for insufficiency.*

See Vol. I., p. 189.

[*Title as in No. 2.*]

To the Chancellor of the State of New York.

In pursuance of an order of this court made in the above entitled [*\*Vol. II, 423*] *\*cause*, on the second day of December, A. D. 1843. whereby it was referred to the subscriber, one of the masters of this court, to (*\**) look into the complainant's bill of complaint, the answer of the said defendant C. D., and the exceptions taken to said answer

by said complainant, and report whether said exceptions are well taken or not:—

I, the said master, do hereby respectfully certify and report, that having been attended by the counsel of the respective parties, and having looked into said bill and answer and the exceptions taken thereto, and having duly considered the same, I find that the second and fourth exceptions to said answer are well taken, and that the first second and fifth exceptions are not well taken. And I do fix the time for said defendant C. D., to put in a further answer to the exceptions allowed, at twenty days after this my report shall become absolute. All which is respectfully submitted. P. G. E., Exception master.

Saratoga Springs, Dec. —, 1843.

4th circuit.

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No. 103.

*Exceptions to master's report on exceptions to answer.*

See Vol. I., pp. 190, 191.

[*Title as in No. 2.*]

Exceptions taken by the said complainant to the report of P. G. E., one of the masters of this court, to whom it was referred to report as to the exceptions filed to the answer of the said defendant C. D.

- 1st. For that the said master has in and by his said report certified that, etc. [*set out the words of the report.*] Whereas the said master ought to have certified that the said exceptions to the answer of said defendant C. D. were well taken, and that the said answer of the said defendant C. D. was imperfect, insufficient and evasive in the particulars excepted to.
- 2d. For that the said master hath certified, etc.

In all which particulars, the report of the said master is, as the said complainant is advised, erroneous, and the said complainant appeals therefrom to the judgment of this honorable court.

E. J., Solicitor and of

counsel for complainant.

[\*VOL. II, 424.]

\*No. 104.

*Order for further answer after report of master.*

See Vol. I., p. 193.

At, etc. [*as in No. 6.*][*Title of cause.*]

The answer of the defendant C. D. having been reported insufficient in the matters of the second and fourth exceptions taken thereto, by P. G. E., the master to whom the exceptions of the complainant to such answer were referred; and the report of the said master having become absolute against the said defendant; on motion of J. E. solicitor for complainant, ordered that the said C. D. put in a further answer to the matters of the said second and fourth exceptions, within twenty days after notice of this order, and pay the costs of such exceptions, or that an attachment issue against [*or that the bill be taken as confessed by*] him.

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No. 104.

*Further answer after exceptions and amendments.*

See Vol. I., p. 195.

[*Title, See Vol. I., p. 195.*]

This defendant, saving and reserving to himself the same benefit of exception to the said original and amended bill, as by his former answer to the original bill is saved and reserved, for answer thereto, or unto so much, etc. [*as in No. 84,*] answers and says, etc.

And this defendant in further answer to such original bill, as to the matters of the second exception taken by the complainant to his former answer, saith, etc.

And this defendant, for further answer to the amendments made to such original bill, saith, etc.

## No. 105.

*Order to refer second or third answer, on the old exceptions.*

See Vol. 1., pp. 196, 198.

At, etc. [*as in No. 6.*]

[*Title of cause.*]

Exceptions having been heretofore taken to the answer of the defend- [\*Vol. II, 425] ant \*C. D., and such answer having been reported insufficient in the matters of the second and fourth exceptions, the said defendant has put in a second [or, *third*] answer to the bill in this cause, which answer the complainant alleges to be insufficient in the matters of the said second and fourth exceptions: on motion of Mr. J. E., solicitor for the complainant, ordered that it be referred to P. G. E., the master to whom such exceptions were originally referred, to look into the bill of complaint, the answers of the said defendant, and the said second and fourth exceptions, and to report whether such second [or, *third*] answer is sufficient in the matters of the said exceptions, or not.

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 No. 106.

*Affidavit to obtain an attachment on third answer being reported insufficient.*

See Vol. I., p. 198.

[*Commence as in No. 2.*] J. E., solicitor for the complainant in this cause, being duly sworn, says that by an order of this court, dated the — day of — last, it was referred to P. G. E., one of the exception masters of this court, to look into the bill of complaint, the answers of the defendant C. D., and the second and fourth exceptions to his original answer, and to report whether the third answer of the said C. D. was sufficient in the matters of those exceptions or not; and that the said master has reported that the said third answer was insufficient in the matters of the said second and fourth exceptions; and that his report was filed in the office of the register of this court, on the — day of — instant, and that the same has become absolute.

## No. 107.

*Order for attachment on third answer being reported insufficient.*

At, etc. [as in No. 6.]

[*Title of cause.*]

On reading and filing due proof, by affidavit, that the third answer of the defendant C. D. has been reported insufficient, on a reference to a master upon the original exceptions, in the matters of the second and fourth exceptions; and that the report of P. G. E., the master to whom the said exceptions were referred, was filed on the — day of [\*VOL. II, 426] — instant, \*and that the same has become absolute; on motion of J. E., solicitor for complainant, ordered that an attachment issue against the said defendant C. D.

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 No. 108.

*Order for examination of defendant on interrogatories, etc., on third answer being reported insufficient.*

See Vol. I., p. 198.

At, etc. [as in No. 6.]

[*Title as in No. 2.*]

The third answer of the defendant C. D. having been reported insufficient, on a reference to a master upon the original exceptions, in the matters of the second and fourth exceptions, and the report of P. G. E., the master to whom such exceptions were referred, having been filed, and having become absolute, an attachment was thereupon issued against the said C. D., in pursuance of an order of this court, dated the — day of — last. And the said C. D. now being personally before the court by virtue of the said attachment, and this court now adjudging the said defendant to have been guilty of the misconduct alleged, and that such misconduct was calculated to, or actually did, defeat, impair, impede or prejudice the rights or remedies of the complainant in this cause, it is thereupon, on motion of Mr. N., of counsel for the complainant, ordered that the said C. D. be examined upon interrogatories before P. G. E., one of the masters of this court, to the points wherein his said third answer is reported insufficient; and that he stand committed to the common jail of the county of Saratoga until

he shall have answered such interrogatories to the satisfaction of the said master, and paid the costs incurred by reason of his default, now taxed at the sum of \$—, and that a warrant issue for that purpose. And it is further ordered that the said sheriff do keep the said defendant in his actual custody, until the court shall have made some order in the premises, and that he carry the said C. D. before the said master to be examined, at such times as such master shall appoint.

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[\*VOL. II, 427]

\*No. 109.

*Master's report as to sufficiency of defendant's examination.*

See Vol. I., p. 201.

[*As in No. 102, to the asterisk (\*),*] examine the defendant C. D. on interrogatories to the points wherein his third answer to the bill in this cause was reported insufficient. I, the said master, do hereby respectfully certify and report, that having been attended by the counsel for the respective parties, and having caused the said C. D. to be brought before me, I examined him upon oath upon the written interrogatories filed for that purpose, [*and also viva voce,*] and that his examination thereto is contained in a schedule hereto annexed, marked A. And I do further certify and report that, in my opinion, the said examination is sufficient. [*Conclude as in No. 102.*]

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No. 110.

*Order to take bill as confessed, on third answer being reported insufficient.*

See Vol. I., p. 201.

At, etc. [*as in No. 6.*]

[*Title of cause.*]

The third answer of the defendant C. D. having been reported insufficient on a reference to a master upon the original exceptions, in the matter of the second and fourth exceptions, and the report of the master to whom such exceptions were referred having been filed and having become absolute, an attachment was issued against the said



C. D., pursuant to an order of this court, dated the — day of — last; and it now appearing by due proof, by affidavit, that the said C. D. (\*) cannot be arrested on such attachment, and does not surrender himself thereon, although more than twenty days have elapsed since notice of the issuing of such attachment was served on his solicitor, [or—(continuing from the (\*)—) having been arrested on such attachment, refuses to answer the interrogatories filed for his examination, to the satisfaction of the master, as also appears by his certificate,] on motion of Mr. N., of counsel for complainant, ordered that the bill in this cause be taken as confessed by the said C. D.

[\*VOL. II, 428]

\*No. 111.

*Exceptions to answer for scandal and impertinence.*

See Vol. I., p. 202.

[*Title of cause.*]

Exceptions taken by the complainant to the answer of the defendant C. D. to the bill of complaint in this cause, for scandal and impertinence.

*First exception.*—For that the said answer is scandalous from and including the word “they,” in the third line of the second folio, down to and including the word “appear,” in the eleventh line of the third folio thereof.

*Second exception.*—For that the said answer is impertinent from and including, etc. [*as above.*]

In all which particulars this exceptant excepts to the said answer put in by the defendant C. D. to the said bill of complaint, as scandalous or impertinent, and he humbly insists that the same ought to be expunged from the said answer.

J. E., Solicitor and of

counsel for complainant.

## No. 112.

*Order to expunge scandal and impertinence from answer, on report of master.*

See Vol. I., p. 204.

At, etc. [*as in No. 6.*]

[*Title of cause.*]

The answer of the defendant C. D. having been reported by P. G. E., the master to whom the exceptions for scandal and impertinence were referred, to be scandalous in the matter of the first and second exceptions, and impertinent in the matter of the fourth, on reading and filing due proof that said report has become absolute against the said defendant, on motion of J. E., solicitor for the complainant, ordered that the register of this court do expunge from the said answer such scandalous and impertinent matter, according to said report. And it is further ordered that the said C. D. pay to the complainant [\*Vol. II, 429] or his solicitor the \*costs of the said exceptions and the proceedings thereon, within twenty days after service of a copy of this order and of the taxed bill of costs, on him or his solicitor, or that an attachment issue against him.

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 No. 113.

*Order to expunge scandal and impertinence on submission to exceptions.*

See Vol. I., p. 204.

At, etc. [*as in No. 6.*]

[*Title.*]

The answer of the defendant C. D. having been excepted to for scandal and impertinence, and the said defendant having submitted to such exceptions in the matters of the first, second, and fourth exceptions, as appears by a notice of such submission signed by his solicitor and served upon the complainant's solicitor; on reading and filing such notice of submission, and on motion [*conclude as in No. 112. with the exception of saying—according to said notice of submission—instead of—according to said report.*]

## No. 114.

*Order for leave to amend bill after a general demurrer.*

See Vol. I., pp. 206, 210.

At, etc. [*as in No. 6.*]

[*Title as in No. 2.*]

The defendant C. D. having put in a general demurrer to the bill of complaint in this cause, for want of equity, on motion of Mr. N. of counsel for complainant, ordered that said complainant have leave to amend his bill as he may be advised, upon payment of costs to be taxed.

## No. 115.

• *Order for leave to amend bill after a plea to part is allowed.*

See Vol. I., p. 212.

At, etc.

[*Title of cause.*]

The plea of the defendant C. D. to the bill of complaint in this cause having been, on argument, allowed as to part of said bill, on motion of [\*VOL. II, 430] \*Mr. N. of counsel for complainant, ordered that the complainant have leave to amend said bill by [*state the manner in which it is to be amended*] upon payment of costs to be taxed.

## No. 116.

*Petition for leave to withdraw replication and amend bill.*

See Vol. I., p. 213.

[*Commence as in No. 39.*] The petition of the above complainant respectfully sheweth, that the defendant in this cause has caused his appearance to be entered therein, and has put in his answer to the bill of complaint; and that your petitioner has filed a replication, but no witnesses have been examined by either party. That since the filing of such replication your petitioner has been advised by his counsel and believes, that it is essential to the rights of your petitioner

in this cause that the bill therein should be amended, by adding thereto the following statements [*insert matter proposed to be introduced.*]

And your petitioner further shows, that he had no knowledge of the facts above set forth, nor was he aware of the necessity of inserting them in his bill, until after the said replication was filed.

Your petitioner therefore prays that he may be at liberty to withdraw his said replication, and amend his bill by adding parties defendants, or otherwise, as he shall be advised, on payment of costs.

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No. 117.

*Amendments to bill.*

See Vol. I., pp. 219, 220.

[*Title of cause.*]

Amendments to the bill of complaint in this cause, made pursuant to an order of this court dated the — day of — instant.

1st. In the 3d line of the 2d folio of the bill, after the word “testator” interline, “to wit, on or about the 5th day of June, 1842.”

2d. After the word “satisfaction” in the 10th line of the 5th folio, insert the amendment marked A., which is annexed to the bill on file, as follows : [*insert amendment.*]

3d. Strike the names of I. H. and D. T. out of the 7th line of the 4th folio.

J. E., Solicitor and of  
counsel for complainant.

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[\*VOL. II, 431]

\*No. 118.

*Order allowing complainant to dismiss bill.*

See Vol. I., p. 225.

At, etc. [*as in No. 6.*]

[*Title.*]

The complainant applying to dismiss his bill in this cause, on motion of J. E., solicitor for said complainant, it is ordered that leave to dismiss the same be granted accordingly, on said complainant paying to the defendant his costs in this suit, to be taxed.

## No. 119.

*Petition for production and inspection of papers.*

See Vol. I., p. 229.

[*Commence as in No. 39.*] The petition of the above complainant respectfully showeth—That the answer of the defendant C. D. has been put in this cause, and a replication thereto has been filed, but that no testimony has been taken in the cause, nor has the same been noticed for hearing. That by the answer of the said defendant, he admits that he is in possession of divers books, deeds, letters, accounts, and other papers relating to the matters at issue in this cause.

And your petitioner further shows that he has a direct and immediate interest in the said books, deeds and other papers, and that an inspection thereof is necessary to enable him to examine witnesses in this cause, and to prepare such cause for hearing.

Your petitioner therefore prays that the said defendant may be ordered to produce to, and leave with, the register of this court, the books, deeds, and other papers above mentioned; and that your petitioner, his solicitor, agent, or counsel, may be at liberty to inspect and peruse the same, and to take copies thereof, or extracts therefrom, as he may be advised.

## No. 120.

*Order for production of papers.*At, etc. [*as in No. 6.*][*Title of cause.*]

On reading and filing the petition of the complainant in this cause [\*VOL. II, 432] \*duly verified, [*and on reading and filing due proof of the service of notice of this motion,*] and on motion of J. E., solicitor for said complainant, in support of the same, and on hearing Mr. N. in opposition thereto, [*or, and no one appearing to oppose,*] ordered that the defendant C. D. do, within ten days from the date of this order, produce to, and leave with, the register of this court, the books, deeds, letters, accounts, and other papers relating to the matters at issue in this cause which are admitted by the said defendant's answer to be in

his possession; and that the complainant, his solicitor, agent, or counsel, may be at liberty to inspect and peruse the same, and to take copies thereof, or extracts therefrom, as he may be advised, at his own expense; but that the said defendant be at liberty to seal up such parts of the said books, deeds, etc., as he shall make oath do not, in any manner, relate to the matters in controversy in this suit.

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No. 121.

*Notice of motion for the payment of money into court, upon admissions.*

See Vol. I., p. 237.

[*Title of cause.*]

Sir:

Take notice, that I intend to move this honorable court on the day of — next, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the capitol in the city of Albany, for an order that (\*) the above named defendant may, on or before the — day of — next, pay into the hands of the register of this court, in trust in this cause, the sum of \$——, admitted by the answer of the said defendant to be due from him; and that the same, when paid in, may be deposited in trust by the register in such bank, or invested by him in trust in such manner as this court shall direct, with costs. And for such further, or for such other order or relief as the court may think proper to grant; which motion will be founded on the bill and answer in this cause.

Dated December 5th, 1843.

To W. N., Esq.  
Sol. for deft.

Yours, etc.  
J. E., Solicitor for complainant.

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[\*VOL. II, 433]

\*No. 122.

*Order to pay money into court.*

At, etc. [*as in No. 6.*]

[*Title.*]

On reading and filing bill and answer in this cause, [*and due proof of service of notice of this motion,*] and on motion of J. E. solicitor for

the complainant, and on hearing Mr. N. in opposition to said motion, [or, *no one appearing to oppose,*] it is ordered, that (\*) the defendant C. D. do, on or before the —— day of next, pay into the hands of the register of this court, in trust in this cause, the sum of \$——, admitted by the answer of said defendant to be due from him; and that when such money is paid in it be deposited by said register, in trust, in the Bank of Albany [*or invested on bond and mortgage, in trust,*] to the credit of this cause, there to remain until the further order of this court.

## CHAPTER VIII.

## PROCEEDINGS ON THE PART OF THE DEFENDANT PREVIOUS TO REPLICATION.

No. 123.

*Affidavit to procure dismissal of bill, for want of prosecution.*

See Vol. I., pp. 242, 246.

*Commence as in No. 2.]* E. F., one of the defendants in this cause, being duly sworn, deposeseth and saith, that the bill in this cause was filed on or about the — day of — last; that the answer of this deponent was put in on the — day of — last, and that the cause is in readiness for hearing on bill and answer as to this deponent; but that the cause is not in readiness for hearing as to C. D. and G. H., the other defendants therein; their answers not having yet been filed; and that the complainant has taken no steps to compel the said defendants to answer, or to expedite the proceedings against them.

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 No. 124.
*Notice of motion to dismiss bill for want of prosecution.*

[*As in No. 121 to the asterisk, (\*) then*] the bill of complaint in this cause be dismissed with costs, for want of prosecution. And for such [\*VOL. II, 434] \*other, etc. [*as in No. 121*] which motion will be founded upon the affidavits with copies whereof you are herewith served.



## No. 125.

*Order to dismiss bill for want of prosecution.*

At, etc. [as in No. 6.]

[*Title of cause.*]

On reading and filing affidavits, etc. [and due proof of service of notice of this motion] and on motion of W. N., solicitor for the defendant C. D., and on hearing Mr. J. E., solicitor for the complainant, in opposition thereto, it is ordered (\*) that the bill of complaint in this cause be dismissed, with costs, for want of prosecution.

## No. 126.

*Affidavit to put complainant to his election.*

See Vol. I., pp. 246, 248.

[*Commence as in No. 2.*] C. D., the defendant in this cause, being duly sworn, deposeth and saith, that the complainant is prosecuting this deponent both at law and in this court, in the above entitled cause, for the same matter and cause of action; whereby this deponent is doubly vexed. And this deponent further saith, that he caused his answer in this suit to be filed and served on the — day, of — last.

## No. 127.

*Notice of motion for order that complainant elect.*

[As in No. 121 to the asterisk (\*)—then] the complainant in this cause may elect whether he will proceed in this court, in the above entitled suit, (\*) or in the suit commenced against the defendant in the supreme court; and that if he shall elect to proceed in this court, then that his proceedings in the said suit in the supreme court may be stayed by injunction; but that in default of such election, within the time limited by the court, or if the complainant shall elect to proceed at law, then that the bill in this cause stand dismissed with costs.(f)

And for such other, etc. [*as in No. 121*] which motion will be founded [\*VOL. II, 435] on the affidavits, \*copies whereof are hereto annexed, and on the pleadings in the causes above mentioned respectively.

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## No. 128.

*Order that complainant elect.*

At, etc. [*as in No. 6.*]

[*As in No. 125 to the asterisk (\*)—then*] that the complainant in this case do, within eight days from the date of this order, elect whether he will proceed in the present suit in this court [*conclude as in No. 127, from the (\*) to the (†)*].

## CHAPTER IX.

## REPLICATION.

No. 129.

*General replication.*

See Vol. I., p. 249

## IN CHANCERY.

Before the Chancellor

[or, *before the vice-chancellor of the 5th circuit.*]The replication of A. B., complainant,  
to the answer of C. D., defendant.

This repliant, saving and reserving to himself, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer [*and further answer*] for replication thereunto, says that he will aver, maintain and prove his bill of complaint to be true, certain and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever, in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain and prove, as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

J. E., Solicitor for complainant.

[\*VOL. II, 436]

## \*CHAPTER X.

## TESTIMONY.

## No. 130.

*Affidavit to obtain order to examine a defendant as a witness.*

See Vol. I., pp. 257, 260.

[Commence as in No. 2.] E. F., one of the defendants in this cause, being duly sworn, deposeseth and saith, that on the — day of — last his solicitor received from the complainant's solicitor, as he is informed by his said solicitor and believes, notice of the usual rule to produce witnesses having been entered in this cause. And this deponent further saith that C. D., one of the defendants in this suit, is a material witness for this deponent therein, and is not interested in the matter to which this deponent wishes to examine him.

## No. 131.

*Order to examine a defendant as a witness.*

At, etc. [as in No. 6.]

[This form is omitted, because no special order is necessary. The order is an order of course. See the text, Vol. I., p. 257.]

## No. 132.

*Affidavit to obtain order for examination of witnesses de bene esse.*

See Vol. I., pp. 270, 273.

[Commence as in No. 2.] A. B., the complainant in this cause, being duly sworn, deposeseth and saith that he has exhibited his bill in

[\*VOL. II, 437] this \*cause against the defendant, to which the said defendant has appeared (\*). That J. H., of the city of Utica, merchant, is of the age of seventy years and upwards, [or, *is dangerously ill, and is not expected to recover,*] and is a material witness for this deponent in the above entitled cause.

[If the application is upon the ground that the witness is the only person who knows the fact, the affidavit should be varied as directed, Vol. I., p. 273.]

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No. 133.

*Order to examine a witness de bene esse.*

At, etc. [as in No. 6.]

[*Title of cause.*]

On reading and filing affidavits, etc. [as in No. 122, to the (\*), then] the complainant be at liberty to examine J. H., of the city of Utica, as a witness in this cause, *de bene esse*, before an examiner of this court residing in the county of Oneida, and that the defendant in this cause be allowed to attend such examination and cross-examine the said witness.

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No. 134.

*Notice of examination of witnesses de bene esse.*

See Vol. I., p. 275.

[*Title of cause.*]

Sir:

Take notice that J. H., of the city of Utica, merchant, will be examined as a witness in this cause, *de bene esse*, at his residence, No. 10 Broad street, before P. G., an examiner of this court, pursuant to an order thereof dated the — day of — instant, on the — day of — instant, at 10 o'clock A. M.

Dated December —, 1843.

To S. N., Esq.,

Yours, etc.

Sol. for deft.

J. E., Solicitor for complainant.

[\*VOL. II, 438]

\*No. 135.

*Order to produce witnesses.*

See Vol. I., p. 277.

At, etc. [as in No. 6.]

[*Title of cause.*]

This cause being at issue, as to all the defendants, [except G. F.,] by the filing of replications to the several answers of such defendants, [and being in readiness for hearing as to the said G. F. by the bill having been taken as confessed by him,] and more than twenty days having elapsed since the filing of such replications, and no notice of an application for the examination of witnesses before a vice-chancellor, or in open court, or for an issue, having been given; on motion of J. E., solicitor for the complainant, ordered that the parties produce witnesses in this cause within forty days after notice of this order.

No. 136.

*Notice of order to produce witnesses.*[*Title of cause.*]

Sir:

Take notice, that by an order of this court, dated the — day of — instant, the parties in this cause are required to produce witnesses therein, within forty days after notice of said order. [*Conclude as in No. 134.*]

No. 137.

*Notice of the examination of witnesses before an examiner.*[*Title of cause.*]

Sir:

Take notice, that the following witnesses, to wit, S. N., of the village of Waterford, counsellor at law, and D. F., of the town of Malta, physician, will be examined on behalf of the above complainant, before T. G. Y., one of the examiners of this court, at his office in

Ballston Spa. Such examination to commence on the — day of — next, at ten o'clock in the forenoon, and to proceed as shall suit the convenience of such examiner. [*Conclude as in No. 134.*]

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[\*VOL. II, 439]

\*No. 138.

*Subpœna for witnesses before examiner.*

See Vol. I., p. 279.

The People of the State of New York, to S. N. and D. F., [L. s.] greeting: We command and strictly enjoin you, and each of you, that laying all other matters aside, and notwithstanding any excuse, you personally be and appear before T. G. Y., one of the examiners of the court of chancery, at his office in Ballston Spa, on the — day of — instant, at ten o'clock in the forenoon, then and there to testify the truth in a certain cause depending in our court of chancery, between A. B. [*and others*] complainant, and C. D. and E. F., defendants, on the part of the said complainant, and this you may in no wise omit, under the penalty of forfeiting fifty dollars, and being deemed guilty of a contempt of court, and being responsible to the aggrieved party for the loss and hindrance occasioned by such failure.

Witness, Reuben H. Walworth, Chancellor of our State, at the city of Albany, the fifth day of December, in the year of our Lord one thousand eight hundred and forty-three.

J. E., Solicitor for complainant.

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 No. 139.
*Demurrer by witness, on examination before an examiner.*

See Vol. I., p. 282.

[*Title of cause.*]

The demurrer of S. N., a witness produced and sworn on the part of the complainant, before T. G. Y., one of the examiners of this court, on the — day of —, 1843.

This demurraut being interrogated whether [*state the question*], answers and says that he demurs to the said question, and for cause of

demurrer avers that his answer to the said question might subject him to pains and penalties [or, *to a forfeiture, or to a decree against himself.*] And therefore he submits to the judgment of the court whether he shall make any further answer in the premises. S. N.

On this — day of —, 1843, S. N., the above demurrant, was sworn before me that the matters set forth in the above demurrer, by him subscribed, were true.

T. G. Y., Examiner in Chancery

[\*Vol. II, 440]

\*No. 140.

*Affidavit to obtain an order for an interpreter.*

See Vol. I., p. 285.

[*As in No. 132 to (\*), then*] and that such cause is at issue upon bill, answer and replication. That this deponent's solicitor, as he is informed by said solicitor, and believes, has given notice of the examination of witnesses before T. G. Y., one of the examiners of this court, on the — day of — instant. That D. F., one of the witnesses proposed to be examined on the part of this deponent, is a native of Italy, and does not understand the English language, and that it will be necessary to appoint an interpreter, before he can be examined.

No. 141.

*Order for interpreter.*

At, etc. [*as in No. 6.*]

[*Title of cause.*]

On reading and filing affidavits, and on motion of Mr. E., of counsel for complainant, no one appearing to oppose, ordered that B. H. be appointed an interpreter to interpret truly the oath to be administered and the questions to be put to D. F., a witness to be examined on the part of the complainant in this cause, before T. G. Y., one of the examiners of this court, out of the English language into the Italian lan-



guage, and to interpret the answers of the said D. F. thereto, out of the Italian into the English language; and that the said examiner do first administer to him the usual oath to interpret truly and faithfully as aforesaid.

---

No. 142.

*Depositions taken before an examiner.*

See Vol. I., p. 285.

[*Title of cause.*]

Depositions of witnesses produced, sworn and examined in the above entitled cause, on the part of the complainant.

Dec. 5th, 1843. The parties by their respective counsel met in the [\*VOL. II, 441] \*examiner's office. An adjournment was had to the 10th day of December, 1843; at which time the following proceedings are had:

The defendant's counsel objects to any proceeding in this cause, and the taking of testimony therein, because the cause has not been revived since the death of T. B. The examiner overruled the objection, and the testimony is taken at the instance of the complainant's counsel.

*Wm. H. Alexander*, a witness produced, sworn and examined on the part and behalf of the complainant, says [*insert his testimony.*]

All of the previous testimony of this witness, in due season objected to by the defendant's counsel. The question arising on the objection was reserved by the examiner, and the testimony taken, at the instance of the complainant's solicitor.

Wm. H. Alexander.

*Cross examination.*

Had you anything to do with, etc. [*insert cross examination.*]

Wm. H. Alexander.

Subscribed and sworn to this }  
 — day of —, 1843, be- }  
 fore me,

T. G. Y., Examiner in Chancery.

*Further direct examination.*

[*Insert the further direct examination.*]

Adjourned, by consent, to the 15th day of December instant, at the same place, at 10 o'clock A. M.

December 15th, 1843. The parties appear by their counsel respectively, as before.

*E. W. L.* A witness produced, sworn and examined on the part and behalf of the complainant, says, etc. Question, upon what note did you understand, from the conversation with Gardner, was the suit in the supreme court brought? Objected to by the defendant's counsel, on the ground that it is improper for the witness to state his understanding, without detailing the conversation. Objection overruled. Answer—the note, etc.

Sworn, etc.

*E. W. L.*

[*Title of cause.*]

The foregoing are the depositions of witnesses on the part of the complainant, sworn and examined before me in the above entitled cause. Dated Dec. 16th, 1843.

T. G. Y., Examiner in Chancery.

[\*VOL. II, 442]

\*No. 143.

*Notice as to what defendants are entitled to take testimony.*

See Vol. I., p. 290.

[*Title of cause.*]

Sir:

Take notice the following are the names of the defendants, besides yourself, who have a right to take testimony in this cause, and of the solicitors by whom they appear respectively—J. C. W. by J. D., his solicitor, and R. M. by S. N., his solicitor. Dated, etc.

Yours, etc.

J. E., Solicitor for complainant.

To G. F., Solicitor for  
defendant, C. D.

## No. 144.

*Petition for a commission to examine witnesses within this state.*

See Vol. I., p. 293.

[*Title as in No. 2.*]

To the register, [*or assistant register,*] of the court of chancery, [*or clerk in chancery for the — circuit.*](a)

The petitioner of A. B., complainant in the above entitled cause, respectfully sheweth, that as your petitioner is informed by his solicitor, and believes, the above entitled cause is in readiness to take testimony; that no application has been made to examine the witnesses in presence of a vice-chancellor, or to take the testimony in open court at the hearing, or for an issue, within the time prescribed by the rules of this court; that an order to produce witnesses in this cause has been entered, and notice thereof served upon [*or, by*] the solicitor of your petitioner on the — day of —, 1844. Your petitioner further shows, that S. T. of Day, in the county of Saratoga, is a material witness for your petitioner in the above cause; but that the residence of the said S. T. is more than twenty miles from any examiner of this court.

Your petitioner therefore prays, that a commission may issue out of and under the seal of this court, for the examination of the said S. T. directed to U. V., W. X. and Y. Z., of the said town and county.

And your petitioner will ever pray, etc.

A. B.

[*Jurat. See Vol. I., p. 44.*]

[\*VOL. II, 443]

\*No. 145.

*Notice of presentation of petition.*

[*Title of cause.*]

Sir:

Take notice, that a petition, with a copy of which you are herewith served, will be presented to the register [*or, assistant register*] of

(a) If the application is made the court, as it may be, in some cases (see Vol. I., p. 294), the petition should be addressed—"To the chancellor of the State of New York."

this court, [*or, clerk in chancery for the fourth circuit,*] on the — day of — instant, and a motion thereupon made that the prayer of said petition be granted.

To J. E., Esq.,

Sol'r for deft.

Yours, etc.

W. A. B., Solicitor for complainant.

No. 146.

*Affidavit of service of petition and notice, etc.*

[*Title of cause.*]

*Saratoga County, ss:* W. A. B., solicitor for the complainant in the above entitled cause, [*or, R. B., clerk in the office of W. A. B., the complainant's solicitor in the above entitled cause,*] being duly sworn, says, that on the — day of — he served on J. E., the solicitor for the above named defendants, a copy of the foregoing petition, with a notice that an application would be made to the register of this court on the — day of —, that the prayer thereof be granted. That such service was made by leaving said petition and notice in the office of the said J. E. with E. P., a clerk, who had charge of the same—the said J. E. being absent therefrom.

No. 147.

*Order for commission to examine witnesses within the state.*

See Vol. I., p. 294.

At, etc. [*as in No. 6.*]

[*Title as in No. 2.*]

On reading and filing the petition of the above named complainant, duly verified, praying that a commission may issue to examine S. T. [\*VOL. II, 444] of \*Day, in the county of Saratoga, as a witness on the part of said complainant; on motion of W. A. B., of counsel for said complainant, it is ordered that a commission issue for the examination of the said S. T., to be directed to U. V., W. X. and Y. Z., of the said town of Day, commanding them to examine the said S. T.,

either orally, or upon interrogatories to be annexed to said commission.

[N. B. If the defendant wishes to join in the commission and examine witnesses, the names of his witnesses must be inserted in the order and commission.]

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No. 148.

*Commission to examine witness within the state.*

The People of the State of New York, to U. V., W. X. and [L. s.] Y. Z., of the town of Day, in the county of Saratoga: Know ye, that we, having full faith in your prudence and competency, have appointed you commissioners, and by these presents do authorize and require you, or any one or more of you, to examine orally or upon interrogatories annexed to this commission, S. T., of the said town of Day, as a witness on the part of the complainant [*and O. P. and Q. R. of the same place, as witnesses on the part of the defendants*], in a certain cause pending in our court of chancery, wherein A. B. is complainant and C. D. and others are defendants, on oath to be by you administered; to take and certify the depositions of the said witnesses, and return the same in accordance with the directions hereto annexed.

Witness, R. H. W., chancellor of our said state, at Saratoga Springs, this 10th day of January, 1843.

G. M. D., Register [*or clerk.*]

J. E., Solicitor for complainant.

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No. 149.

*Interrogatories to be annexed to commission.*

Interrogatories to be administered to witnesses  
in pursuance of commission annexed.

*First.*—What is your name, occupation, and place of residence?

*Second.*—Do you know the complainant and defendant in this cause?

How long have you known them? Declare.

*Third.*—Were the complainant and defendant ever married to each other? Did they ever live together as man and wife? and when, and how long? Were you present at the ceremony of [\*Vol. II, 445] their \*intermarriage? Where did it take place, and when? Do you know anything, and what, in relation to their intermarriage? Declare fully.

*Fourth.*—Where does the defendant in this cause now reside? Does she live with one T. B., or with any other man, and whom? Does she live with the said T. B., or any other man, and whom, as his wife, or under what other circumstances? Has she had any child or children by the said T. B., or any other man with whom she now lives, or by any other man than the complainant? If so, when and by whom, and does she still reside with any man, and whom, as his wife?

*Fifth.*—Has the said defendant ever cohabited with any person other than the complainant, to your knowledge?

J. E., Solicitor for complainant.

W. L. F., of counsel for complainant.

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No. 150.

*Instructions to commissioners as to execution and return of commission.*

See Vol. I., pp. 295, 300.

[*Title of cause.*]

Instructions to the commissioners for the examination of witnesses in this cause.

[These instructions are similar in form to those already given for the execution and return of a commission to take an answer, (see No. 96, ante, p. 417,) and can easily be framed from the ample directions in the text, pp. 295 to 304.]

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No. 151.

*Notice of examination of witnesses before commissioners within the state.*

See Vol. I., p. 295.

Similar in form to No. 137, ante, p. 438.

## No. 152.

*Commission to examine witnesses out of the state.*

See Vol. I., p. 299.

Is in the same form as No. 148, with the exceptions pointed out Vol. I., p. 299.

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[\*VOL. II, 446]

\*No. 153

*Notice by part of commissioners to the others.*

See Vol. I., p. 300.

[*Title of cause.*]

The subscribers having received a commission issuing out of, and under the seal of the court of chancery of the state of New York, directed to us and yourselves, as commissioners, for the examination of witnesses in a certain cause depending in said court between A. B., complainant, and C. D., defendant, do hereby give you notice that we shall proceed to execute such commission on the part of the complainant [or, *defendant*], on the — day of — instant, at the City Hotel, in the city of —, at ten o'clock in the forenoon.

Dated December —, 1843.

G. H.

To O. P. and W. R.

L. M.

## No. 154.

*Letters rogatory.*

See Vol. I., p. 305.

State of New York, ss.

The People of the state of New York to any judge or tri-  
[L. s.] bunal having jurisdiction of civil causes at the Island of St. Croix, greeting: Whereas a certain suit is pending in our court of chancery, in which A. B. is complainant and C. D. defendant, and it has been suggested to us that there are witnesses residing within your jurisdiction, without whose testimony justice cannot be com-

pletely done between the said parties, we therefore request you, that in furtherance of justice you will, by the proper and usual process of your court, cause such witness or witnesses as shall be named or pointed out to you by the said parties, or either of them, to come before you, or some competent person by you for that purpose to be appointed and authorized, at a precise time and place by you to be fixed, and there to answer on their oaths and affirmations to the several interrogatories hereto annexed; and that you will cause their depositions to be committed to writing and returned to us under cover, duly closed and sealed up, together with these presents. And we shall be ready to do the same for you, in a similar case, when required.

Witness Reuben H. Walworth, our chancellor, at the city of Albany, the — day of —, 1843.

J. E., Solicitor for complainant.

J. M. D., Register.

[\*VOL. II, 447]

\*No. 155.

*Notice of motion for leave to prove a deed at the hearing.*

See Vol. I., pp. 309, 310.

[As in No. 121 to the (\*), then] the complainant be at liberty, on the hearing of this cause to examine N. M. as a witness *viva voce* to prove the execution of a deed executed by E. F. to J. K., purporting to convey a certain lot of land in the town of Day, in the county of Saratoga, called the Baker lot, and bearing date the — day of —, 1840.

Dated etc.

Yours, etc.

The *order* can easily be framed from the above notice.



## CHAPTER XI.

## HEARING.

No. 156.

*Notice of hearing.*

See Vol. I., p. 312.

*[Title as in No. 2.]*

Sir :

Please take notice that this cause will be brought to a hearing on bill and answer [*or on pleadings and proofs ; or on the demurrer filed therein ; or on bill, answer and replication*] before the chancellor [*or vice-chancellor of the 5th circuit*] on the — day of January next, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Dated the — day of December, 1843.

To W. N. Esq.

Yours, etc.

Sol. for def.

J. E., Solicitor for complainant.

No. 157.

*Note of issue.*

See Vol. I., p. 313.

*[Title of cause.]*

Note of issue.

This cause belongs to the 1st class, and is to be heard on bill taken as confessed by all the defendants ; [*or, belongs to the 2d class, and is to* [\*VOL. II, 448] *\*be heard on the plea, (or demurrer,) of the defendant, etc.*] and is entitled to priority from the — day of —, 1843.

Dated December —, 1843.

To J. M. D., Esq.,

Yours, etc.

Register, [*or clerk.*]

J. E., Solicitor for complainant.

## No. 158.

*Case and abbreviation of pleadings.*

See Vol. I., p. 319.

[*Title of cause.*] Case and abbreviation of pleadings.

The bill in this cause was filed on the 27th of October, 1840, before the chancellor. The answer was filed on the 21st of December, 1840, and the replication on the 2d day of January, 1841. The following witnesses were examined on the — day of January, 1841, before T. G. Y., an examiner of this court, in pursuance of an order to produce proofs, entered on the — day of January, 1841, to wit, E. F. and G. H., on the part of the complainant, and M. N. and O. P., on the part of the defendant.

The defendant appeared by H. R. S., Esq., his solicitor, who has died since the commencement of the suit, and J. B., Esq. has been substituted in his place as solicitor for said defendant.

The object of the bill is to procure a conveyance from the defendant of the legal estate in the premises particularly described in the bill, and being lot No. 9 in the New Stockbridge Tract.

## Bill.

States that before complainant purchased lot No. 7, James Alexander owned the improvements, etc.

Lot No. 9 was leased to Alexander on the — day of —, but by an understanding, etc.

On the 3d of February, 1837, etc.

Complainant paid his share of the money, etc.

Usual charge of confederacy, etc.

Answer on oath prayed for.

\*Prayer for in- [\*VOL. II, 449] junction; that defendant may be decreed to execute conveyance; and for general relief.

General replication.

## Answer.

Admitted. But defendant, on the — day of —, purchased of Alexander all of the improvements, etc.

Denies that by any understanding, the 10 acres, etc.

Substantially admitted.

Denied.

General traverse and usual conclusion.

J. E., Solicitor for complainant.  
W. H., of Counsel.

## No. 158.a.

*Order of reference, preparatory to a hearing where the bill has been taken as confessed as to some of the defendants as absentees, and others contest the suit.*

See Vol. I., p. 95.

<p>A. B.</p> <p>vs.</p> <p>C. D. and others.</p>
--

At, etc. [*as in No. 6.*]

On filing due proof that the bill in this cause has been taken as confessed against C. D., one of the defendants therein, as an absentee, and on motion of P. S., solicitor for the complainant, it is ordered that it be referred to one of the masters of this court to take proof of the facts and circumstances stated in such bill, as against the said absentee, and to report such proofs to the court with all convenient speed. [*If the bill is to obtain satisfaction of a debt, add*] And it is further ordered, that the said master do examine the complainant on oath as to any payments which may have been made to him, or to any other person for his use, on account of the demand mentioned in the bill, and which ought to be credited on such demand.

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No. 159.

*Points on hearing.*

See Vol. I., p. 315.

[*Title of cause.*]

Defendant's Points.

- I. The complainants have a perfect remedy at law whereby they may avail themselves of every ground of complaint set forth in the bill.
- II. The court of chancery will not assume jurisdiction of this case upon the ground of its being a bill of peace—Because

1. The bill is filed only against a single party, which party has neither commenced nor threatened to commence a multiplicity of suits, etc.
  - \*2. The apprehensions of the complainants [\*Vol. II, 450] that they have incurred, etc.
- III. The defendants are vested with full authority, by the 14th section of the charter of 1730, to pass the ordinance in question.
- IV. The ordinance is a reasonable regulation of trade.
- F. A. C., of Counsel for defendants.

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No. 160.

*Notice of motion to suppress depositions.*

See Vol. I., p. 316.

[As in No. 121 to the asterisk, (\*) then,] the deposition of J. M., a witness examined in this cause on the part of the defendant before T. G. Y., Examiner, on the — day of — last, be suppressed. [Conclude as in No. 121.]

---

No. 161.

*Submission of cause.*

See Vol. I., p. 317.

[*Title of cause.*]

It is stipulated and agreed that this cause be submitted to the chancellor [or vice-chancellor] on written arguments. The complainant's counsel to serve his argument within thirty days, and the defendant's counsel to answer the same, and submit the cause within thirty days thereafter.

Dated, etc.

A. G., Solicitor for complainant.

L. H. S., Solicitor for defendant.

## No. 162.

*Order for cause to stand over, to add parties.*

See Vol. I., p. 321.

At, etc. [*as in No. 6.*]

[*Title as in No. 2.*]

This cause coming on to be heard this day, and counsel for both parties having been in part heard; and it appearing to the court that (\*) C. J. and Lucy his wife are necessary parties to this cause; it is ordered that this cause do stand over, to the end that the complainant may make the said C. J. and Lucy his wife parties thereto, either by amendment or supplemental bill, as he may be advised.

[\*VOL. II, 451]

\*No. 163.

*Order for cause to stand over to supply proofs.*

See Vol. I., p. 322.

[*As in No. 162 to the (\*), then,*] the complainant has omitted to introduce proof of the death of D. B., his intestate, it is ordered that this cause do stand over, to the end that the complainant may examine witnesses to prove the death of such intestate.

## No. 164.

*Decretal order retaining bill, with liberty to bring an action at law.*

See Vol. I., p. 324.

At, etc. [*as in No. 6.*]

[*Title of cause.*]

This cause having been brought to hearing upon the pleadings and proofs therein, and having been argued by Mr. W. C. N. of counsel for the complainant, and by Mr. J. E. of counsel for the defendant, it is ordered, adjudged and decreed, and this court, by virtue of the power and authority thereof doth order, adjudge and decree, that the

bill in this cause be retained for twelve months, with liberty to the complainant, in the mean time, to proceed at law touching the matters in question in this cause, as he shall be advised. And it is further ordered, adjudged and decreed, that if the complainant shall commence an action at law and proceed to trial within the time specified, the court reserves the consideration of the costs of this suit, and of all further directions until after such trial shall be had. But in case the complainant shall not proceed at law and go to trial within the time aforesaid, his bill is from thenceforth to stand dismissed out of this court, with costs to be taxed. And in either case any of the parties are to be at liberty to apply to the court, as they shall be advised.

[\*Vol. II, 452]

## \*CHAPTER XII.

## DECREE.

No. 165.

*Decretal order for a reference as to the title of a vendor, etc.*

See Vol. I., pp. 327, 328, 336.

At, etc. [*as in No. 6.*][*Title of cause.*]

On reading and filing the pleadings in this cause, affidavits, etc. and on hearing Mr. N. of counsel for the defendant in support of this motion, and Mr. P. of counsel for the complainant, in opposition thereto, it is ordered, that it be referred to one of the masters of this court residing in the county of — to inquire whether a good title can be made to the premises comprised in the agreement between the parties to this cause, mentioned in the pleadings therein, and that he state his opinion thereon, to the court. And in case he shall be of opinion that a good title can be made, it is ordered that he do inquire and state when it was first shown that a good title could be made. And that the said master do inquire and report as to the quantity of land agreed to be conveyed by the complainant, and that he take an account of the payments made upon such agreement, by the defendant, and that he ascertain and report the balance now due from him upon the said agreement. And for the better discovery of the matters aforesaid, the parties are to produce before the said master, upon oath, all deeds, books, papers, and writings, in their custody or power relating thereto, and are to be examined upon interrogatories as the said master shall direct. And this court doth reserve the consideration of all further directions, and of the costs of this suit, until after the said master shall have made his report. And either of the parties are to be at liberty to apply to the court as occasion shall require.(a)

(a) It is stated in the text, Vol. I., p. 328, that a decree of this nature should contain a declaration that the contract ought to be specifically performed. And a case in Jacob's Ch. Reports is cited in support of the statement. Mr. Seaton, however, says that according to the old practice, there were two ways of framing the decree in such a case, of which this is one. But he observes, that of late the declaration that the agreement ought to be specifically performed is seldom inserted in the decree directing a reference; but is usually made on further directions. (*Seaton on Decrees*, 210.) And he refers to *Burroughs v. Oakley*, 3 *Swanst.* 172; *Le Grand v. Whitehead*, 1 *Russ.* 309; *Harding v. Beckford*, *V. C.* 11th Nov. 1824; *Bridges v. Robinson*, 3 *Mer.* 694; *Hand's Pr.* 128.

[\*VOL. II, 453]

\*No. 166.

*Interlocutory decree for an account.*

See Vol. I., p. 326.

At, etc. [*as in No. 6.*][*Title of cause.*]

This cause having heretofore [*or this day*] been brought on to be heard upon the pleadings filed and the proofs taken therein; and the said pleadings and proofs having been read, and Mr. S. of counsel for the complainant, and Mr. M. and Mr. O. of counsel for the defendant, having been heard, and the court having duly considered the said pleadings, proofs and arguments, it is ordered, adjudged and decreed, (\*) that it be referred to one of the masters of this court residing in the county of Saratoga, to take a mutual account of all dealings and transactions between the complainant and the defendant in this cause; for the better clearing of which account the parties are directed to produce before the said master, upon oath, all deeds, books, papers and writings in their custody or power, relating thereto, and are to be examined on interrogatories as the said master shall direct; who, in taking the said account, is to make unto the parties all just allowances; and what, upon the balance of the said account, shall appear to be due from either party to the other, is to be paid as the said master shall direct. And this court doth reserve the consideration of the costs of this suit, and of all further directions, until after the said master shall have made his report; when either party is to be at liberty to apply to the court, as occasion shall require.

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 No. 167.
*Final decree for the specific performance of an agreement.*

See Vol. I., p. 333.

At, etc. [*as in No. 6.*][*Title of cause.*]

This cause being brought to hearing for further directions on the report of P. G. E., the master to whom the same stood referred, and the said report, together with the pleadings and proofs, having been read, and Mr. H. S., of counsel for the complainant, and Mr. C. E.



and Mr. M. H., of counsel for the defendant, having been heard, and the court having duly considered the said master's report, pleadings, proofs and arguments, and it appearing to this court that a good title can be made by the complainant to the premises comprised [\*VOL. II, 454] \*in the agreement between the parties to this cause, mentioned in the pleadings therein, and dated the — day of —, 1840; it is thereupon ordered, adjudged and decreed, and this court, in virtue of the power therein vested doth order, adjudge and decree, that the said agreement so made and entered into between the complainant and defendant, and duly proven in this cause, be specifically performed. And it is further ordered and decreed, that the said complainant execute and deliver to the defendant a proper and sufficient conveyance in fee of the premises comprised in the said agreement between the parties, and particularly described therein, to be approved of by P. G. E., one of the masters of this court residing in the county of Saratoga, in case the parties differ about the same. And it is further ordered and decreed, that the said defendant do, upon the tender or delivery to him of such conveyance, pay unto the said complainant, the sum of \$—, the balance of the purchase money of said premises reported by the said master to be still due, with interest thereon at the rate of seven per cent. from the date of the said master's report. And it is further ordered and decreed, that the said defendant do pay to the complainant the costs of this suit to be taxed. And it is further ordered and decreed, that the said complainant have execution against the said defendant for the said sum of \$—, the balance of said purchase money reported by the master to be due, with interest from the date of his report, and for the costs to be taxed as aforesaid, according to the course and practice of the court. And either of the parties is to be at liberty to apply to this court as occasion may require.

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No. 168.

*Enrolment of a final decree.*

See Vol. I., p. 344.

At, etc. [as in No. 6:—the date being the time when the enrolment is signed.]

[*Title of cause.*]

The complainants filed their bill of complaint in this cause, which bill is hereto annexed, on the — day of —, 1842, before the chau-

cellor, against the defendants C. D., E. F., J. K. and G. T. A subpoena to appear in the said cause was thereupon issued, returnable the — day of —, 1842, and was served personally, previous to the return day thereof, on all of said defendants. The defendants C. D. and J. K. appeared in said cause by their solicitor, and G. T. being [\*VOL. II, 455] an infant, \*appeared by S. T., his guardian ad litem, duly appointed by the court. On the — day of —, 1842, upon filing an affidavit of the service of the subpoena upon the defendant E. F., and that he had not caused his appearance to be entered within the time limited by the rules of the court, an order was entered, taking the bill as confessed by the said E. F.

On the — day of —, 1842, an order was entered authorizing the complainant to amend his bill in the manner specified in a notice of motion for that purpose, annexed to an affidavit of the complainant on that day presented, which affidavit is hereto annexed; in pursuance of which order, amendments to the said bill were filed on the — day of —, 1842, which are hereto annexed.

On the — day of —, 1842, the defendants C. D. and J. K. filed their answer to said amended bill, which answer is hereto annexed; and on the — day of —, 1842, the defendant G. T., by her said guardian ad litem, filed her answer thereto, which answer is also hereto annexed. Replications to said answers were filed on the — day of —, 1842, copies whereof are hereto annexed. On the — day of —, 1842, proofs were taken in said cause before T. G. Y., one of the examiners of this court, in pursuance of an order for that purpose previously entered.

On the — day of —, 1843, the cause being in readiness for hearing, was brought to a hearing before the chancellor upon the pleadings and proofs, when an interlocutory decree was made and entered therein, which is in the words and figures following, to wit: [*insert interlocutory decree.*]

On the — day of —, 1843, the cause was brought to a hearing for further directions upon the master's report, made in pursuance of the said interlocutory decree of the — day of —, which report was filed on the — day of —, 1843, and is hereto annexed; whereupon a final decree was made and entered therein, in the words and figures following, to wit: [*insert final decree.*]

Thereupon the costs of the complainant were taxed at \$—, and the costs of the guardian ad litem of the defendant G. T., at \$—.

Whereupon the said pleadings and reports, and such other papers

filed in this cause as are required by the general rules of this court, together with the said taxed bill of costs, are now attached together and hereto annexed; and the said final decree is signed and enrolled, according to the form of the statute in such case made and provided, the day and year in the caption of this enrolment mentioned.

R. H. W. Chancellor.

[\*VOL. II, 456]

\*No. 169.

*Petition to rectify decree before enrolment.*

See Vol. I., p. 349.

[*Commence as in No. 39.*] That a decree was made by this court before the chancellor, in the above entitled cause, on the — day of —, 1842, by which a feigned issue was directed to be made up and settled in this cause, and by which the said feigned issue was directed to be tried at the next circuit court to be held in and for the county of Saratoga, on the first Monday of October then next.

And your petitioner further showeth unto your honor that there was not sufficient time between the date of the said decree and the said first Monday of October, to enable your petitioner to draw up and enter the said decree, or to make up the said feigned issue and have the same settled, so that it could be tried at the said circuit, which has now passed.

And your petitioner further showeth unto your honor that the said decree has not yet been settled and entered by the register, but still remains in the shape of minutes.

Your petitioner therefore prays that the minutes of the said decree may be varied so as to direct the trial of the said feigned issue at the next circuit court to be held in and for said county of Saratoga, on the second Tuesday of January next; and that the said decree, thus varied, may be entered nunc pro tunc, as of the time the same was originally pronounced.

## No. 170.

*Petition for a rehearing.*

See Vol. I., pp. 352, 355.

[*Title of cause.*]

To the Chancellor of the State of New York. The petition of the above defendant respectfully showeth,

That your petitioner finds himself much aggrieved by a decretal order made by your honor in this cause, on the — day of — last, whereby it was among other things ordered that [*insert the part of the decree complained of*]; and your petitioner submits that so much of the said decree is erroneous as directs that, etc., because your petitioner shows unto your honor that, etc.

\*And your petitioner further submits, that so much [\*VOL. II, 457] of the said decree is erroneous as relates to the house and lot in Greenwich street, therein mentioned, and that he is aggrieved thereby: because your petitioner shows unto your honor that at the hearing of the said cause, it was alleged, and strongly urged and insisted on, on the part of the complainant, that the deed in the said decree mentioned had been duly executed by your petitioner; that at the said hearing, the said deed was produced and read, whereby it appeared that your petitioner was a trustee of the said house and lot in Greenwich street; and under the impression that your petitioner was such trustee, your honor, as your petitioner conceives, made the decree in relation to the said house and lot; but your petitioner now shows unto your honor that he has, since the said hearing, discovered that a defeasance to the said deed had been duly executed by — many years before the said hearing, and that the said deed had become null and void; and that your petitioner, through inadvertence or forgetfulness, had neglected to take back the said deed and have the same cancelled, etc.

And your petitioner further shows, that the said decretal order has been settled and entered, but has not yet been enrolled.

Whereupon your petitioner prays that your honor will be pleased to vouchsafe a rehearing of this cause, before your honor, your petitioner submitting to pay such costs as the court shall award, in case his complaint shall be found groundless. And your petitioner will ever pray, etc.

*Certificate of counsel.*

We certify that we have examined the case referred to in the foregoing petition, and are of opinion that the decretal order therein mentioned is erroneous in the particulars specified in the said petition.

H. R. S. }  
D. B. O. } Counsel.

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No. 171.

*Order to stay proceedings, on filing petition of rehearing.*

See Vol. I., p. 359.

At, etc. [*as in No. 6.*]

[*Title of cause.*]

On reading and filing the petition of the defendant C. D. praying for a rehearing of the decretal order made in this cause on the — day of — last, affidavits, etc., and on motion of Mr. H., [\*VOL. II, 458] \*solicitor for said petitioner, no one appearing to oppose, ordered, that the complainant show cause, at the next special term of this court to be held at the capitol, in the city of Albany, on the — day — next, why the prayer of said petition should not be granted; and that in the meantime all proceedings in this cause, on the part of the complainant, be stayed.

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No. 171.a

*Order for leave to file a supplemental bill in the nature of a bill of review.*

See Vol. I., pp. 362, 364.

At, etc. [*as in No. 6.*]

[*Title of cause.*]

On reading and filing the affidavit and petition of the complainant in this cause, and on motion of Mr. N., of counsel for said complainant, and on hearing Mr. H., of counsel for the defendant, it is ordered that upon such complainant's making such deposit, or giving such

security to the defendant, as is required by the 173d rule of this court, he be at liberty to file a supplemental bill in the nature of a bill of review, to bring before the court the matter stated in such petition relative to the new matters discovered since the making of the decree in this cause on the — day of —, 1843, and for relief, as he shall be advised. And further, that he be at liberty to have the original cause brought on to be reheard, and to come on at the same time with the cause upon such bill.

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No. 172.

*Supplemental bill in the nature of a bill of review.*

See Vol. I., p. 362.

[*Caption, address and introduction as in No. 1.*]

That on the — day of —, 1843, G. H., of, etc. (the defendant hereinafter named,) exhibited his bill of complaint in this honorable court against your orator, and thereby set forth that [*insert the original bill.*] And your orator being served with a subpœna for that purpose, appeared and put in his answer to the said bill, to the effect following: [*recite the substance of the answer.*] And the said G. H. replied to the [\*VOL. II, 459] said answer, \*and issue having been joined, and witnesses examined, and the proofs closed, the said cause was brought on to be heard before your honor on the — day of —, 1843, when a decree was pronounced, whereby your honor decreed that [*state the effect of the decree;*] as by the said proceedings and decree now remaining as of record, in this honorable court, reference being thereunto had, will more fully appear.

And your orator further showeth unto your honor, by leave of this honorable court first had and obtained for that purpose, by way of supplement, that since the settling and entering of the said decree, your orator has discovered, for the first time, as the fact is, that the said E. F. was in his lifetime seized in his demesne as of fee, of and in the hereditaments and premises in question in the said cause, and that the said E. F. when so seized, and when of sound mind, duly made and published his last will and testament in writing, bearing date on or about the — day of —, which was executed by him and attested in such manner as by law is required for passing real

estates by devise; and thereby gave and devised unto the said J. W., his heirs and assigns forever, to and for his and their own absolute use and benefit, the said hereditaments and premises in question in the said cause (which your orator claims to be entitled to, as purchaser thereof, from the said J. W.)

And your orator further showeth, that the said decree has never, hitherto, been enrolled, and in consequence of the discovery of such new matter as aforesaid your orator is entitled, as he is advised, to have the said cause heard thereon by your honor, at the same time that it is reheard on the said original bill, in the same manner as if such new matter had been put in issue in the said original suit: To the end therefore [*as in No. 1; and interrogate particularly as to the supplemental matters.*] And that the said will may be established, and declared a valid and effectual devise of the said hereditaments and premises, and that the said cause may be heard on such new and supplemental matter as aforesaid, at the same time that it is reheard upon the said original bill; and that your orator may have such further and other relief as, under the circumstances hereinbefore particularly mentioned, to your honor shall seem meet, and the nature of this case, as it hereby appears, may require. May it please, etc. [*Conclude with praying process of subpoena, as in No. 1.*]

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[\*VOL. II, 460]

\*No. 173.

*Petition to rectify decree after enrolment.*

See Vol. I., p. 366.

[*Commence as in No. 170.*] That a decree was made in the above entitled cause, before the chancellor, on the — day of —, 1843, by which the above defendant was ordered to pay to your petitioner the sum of five hundred dollars, together with the costs of this suit; that such decree was founded upon the report of J. M. A., one of the masters of this court, to whom it was referred to take an account between the parties to this suit and to report what balance was due from either party to the other; and that the said master, in and by his said report, did find the amount due from the defendant to your petitioner to be five hundred and fifty dollars; yet that in drawing the said

decree the words "and fifty" were by mistake omitted in stating the sum reported by the said master to be due to your petitioner.

And your petitioner further showeth, that the said decree has been entered and enrolled, and that the said mistake was not discovered by your petitioner until after the enrolment of said decree.

Your petitioner therefore prays that the enrolment of the said decree may be opened and the mistake in the said decree rectified, so that it may conform to the report of the said master in stating the sum to be paid by the defendant to your petitioner.

And that your petitioner may have such other, etc.

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No. 174.

*Decree by default.*

See Vol. I., p. 372.

At, etc. [*as in No. 6.*]

[*Title of cause.*]

This cause having this day been brought on to be heard upon the pleadings and the proofs taken therein, [*or on the pleadings and proofs as to the defendant C. D., and on bill and answer as to the defendant E. F., and on the bill taken as confessed as to the defendant G. H.*] and on reading and filing proof of the due service of notice of hearing on the solicitor of the said defendant (\*) [*or on such of the defendants as have appeared in this cause*] and on hearing Mr. J. E., of counsel for the complainant, no one appearing on the part of the defendant, it is ordered, adjudged and decreed, etc.

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[\*VOL. II, 461]

\*No. 175.

*Decree by consent.*

See Vol. I., p. 373.

[*As in last form to the asterisk, (\*) then add*] with the consent of the parties to this suit, [*or, with the consent of the complainant and A. B., one of the defendants*] and on motion of J. P. of counsel for the complainant, it is ordered, adjudged and decreed, etc.





## BOOK II.

### PROCEEDINGS SUBSEQUENT TO THE DECREE.

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#### CHAPTER I.

##### APPEALS.

No. 176.

*Bond for costs on appeal, either to court of errors, or to the chancellor.*

See Vol. I., pp. 388, 390, 401, 409.

Know all men by these presents that we, C. D., E. F. and G. H., of the city of Utica, are held and firmly bound unto A. B. in the sum of two hundred and fifty dollars, to be paid to the said A. B., his executors, administrators, or assigns. For which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this — day of —, 1843.

Whereas the above named C. D. has appealed to the court for the correction of errors [*or to the chancellor*] from a decree [*or order*] of the court of chancery of the state of New York, [*or of the vice-chancellor of the fourth circuit,*] made on the — day of —, 1843, in a cause in which the said A. B. was complainant and C. D. was defendant. (\*)

Now, therefore, the condition of this obligation is such, that if the [\*VOL. II, 462] said \*appellant shall diligently prosecute the said appeal, and shall pay all costs and damages that may be awarded against him on the said appeal, then this obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered

in presence of

S. T.

C. D. [L. s.]

E. F. [L. s.]

G. H. [L. s.]

*Approval of bond and sureties.*

I approve of the form and execution of the within bond and of the sufficiency of the sureties therein; each of the said sureties having duly justified.

Dated —, 1843.

P. G. E., Injunction  
 master, 4th circuit.

*Acknowledgment of bond.*

STATE OF NEW YORK, }  
 Saratoga county, } ss.

Be it remembered, that on this — day of December, 1843, before me came C. D., E. F. and G. H., to me well known to be the persons described in, and who executed the within bond, and severally acknowledged that they executed the same for the uses and purposes therein mentioned.

J. H., Justice of the Peace.

*Affidavit of justification by sureties.*

[*Title of cause.*]

Saratoga county, ss.: E. F., of the village of Saratoga Springs, hatter, and G. H. of the same place, baker, being severally sworn, depose and say, and first the said E. F. for himself says, that he is a resident of the said county, and a householder therein; and that he is worth the sum of \$— over and above all just debts and responsibilities. And the said G. H. for himself says that he is a resident of the said county and a householder in the village aforesaid; and that he is worth the sum of \$— over and above all just debts and responsibilities.

Sworn, etc.

E. F.  
 G. H.

## No. 177.

*Bond for debt and for costs on appeal from a decree directing the payment of money.*

See Vol. I., pp. 388, 391.

[*As in No. 176 to the asterisk (\*) with the exception of the amount of the penalty; which must be double the sum decreed to be paid, in addition*

[\*VOL. II, 463] \*to the \$250 for costs of the appeal; then add] in and by which decree the said appellant was, among other things, ordered and directed to pay to the said A. B. the sum of \$—— and the costs of the suit.

Now, therefore, the condition of this obligation is such, that if the said appellant shall diligently prosecute his said appeal, and shall pay all costs and damages that may be awarded against him on the said appeal; and that, if the said appellant shall fail to prosecute his said appeal, or if the same shall be dismissed or discontinued, or if the decree appealed from, or any part thereof, shall be affirmed, then that the said appellant shall pay the amount directed to be paid by such decree, or the part of such amount as to which such decree shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the said appellant by the court for the correction of errors [*if the appeal is to the chancellor, omit the words by the court for the correction of errors,*] upon such appeal, then this obligation to be void; otherwise to remain in full force and virtue.

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No. 178.

*Bond on appeal from a decree directing the assignment or delivery of securities, etc.*

See Vol. I., pp. 388, 391.

[*As in No. 176 to the asterisk, (\*) then add*] in and by which decree the said appellant was, among other things, ordered and directed to assign and deliver to the said A. B. four several promissory notes, dated the —— day of ——, executed by ——, and payable to the said A. B., for one thousand dollars each.

Now, therefore, the condition of this obligation is such, that if the said appellant shall diligently prosecute his said appeal, and shall pay all costs and damages that may be awarded against him on said appeal, and shall abide and obey the order and decree of the court of errors [*or, of chancery*] upon the said appeal, then this obligation, etc.

## No. 179.

*Bond on appeal from a decree directing the delivery of the possession of real estate.*

See Vol. I., p. 389.

[As in No. 176 to the asterisk, (\*) then add] in and by which decree the said appellant was, among other things, ordered and directed to [\*VOL. II, 464] \*deliver to the said A. B. the possession of a certain farm or lot of land, particularly mentioned and described in the said decree.

Now, therefore, the condition of this obligation is such, that if the said appellant shall diligently prosecute his said appeal, and shall pay all costs and damages which may be awarded against him on the said appeal, and if during the time the said appellant or any person claiming under him, shall retain possession of the said farm or lot of land, he shall not commit, or suffer to be committed, any waste thereon; and in case the said appeal shall be dismissed or discontinued, or the decree appealed from shall be affirmed, shall pay the value of the use and occupation of the said farm or lot of land from the time of the said appeal until the delivery of the possession thereof pursuant to the said decree, then this obligation, etc.

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No. 180.

*Bond for costs on appeal from an interlocutory order or decree of a vice-chancellor, and to stay proceedings.*

See Vol. I., p. 391.

[As in No. 176 to the end of the penalty: except that the amount of the penalty must be \$250, and such additional sum as the vice-chancellor on application to him shall direct—then say:]

Whereas the above named C. D. has appealed to the chancellor from an interlocutory order or decree of the vice-chancellor of the fourth circuit, made on the — day of —, 1843, in a cause in which the said A. B. was complainant, and C. D. was defendant.

Now, therefore, the condition of this obligation is such, that if the said appellant shall diligently prosecute his said appeal, and shall pay all costs which may be awarded against him on such appeal, and shall pay the debt or damages which shall be finally decreed against the said appellant, in the said suit, in case the said appeal shall be dismissed, or the said interlocutory order or decree shall be affirmed, then this obligation to be void, etc.

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No. 181.

*Certificate of probable cause for appealing from a vice-chancellor.*

See Vol. I., p. 392.

[*Title of cause.*]

I do hereby certify, that in my opinion there is probable cause for [\*VOL. II, 465] \*appealing from the order [*or decree,*] made by me in the above cause, on the — day of —, instant; that such order [*or decree*] involves the merits of the cause, or some part thereof; and that it is reasonable and proper that the questions arising on such appeal, should be decided by the chancellor, before the final decree in the cause, and before any further proceedings are had on such order [*or decree*] before me.

Dated, Dec. —, 1843.

J. W., Vice-Chancellor.

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No. 182.

*Notice of appeal.*

See Vol. I., p. 400.

[*Title of cause, as in No. 2.*]

Sir:

Take notice that the defendant, [*or E. F., one of the defendants*] in the above cause, has appealed to the chancellor from the decree [*or order*] made therein, on the — day of —, 1843, by the vice-chancellor of the fourth circuit [*or the assistant vice-chancellor*]; and that

a bond for costs and damages upon said appeal, in the penalty of \$250, [*or that a bond for costs, and to stay the proceedings,*] with the requisite securities, has been duly filed.

Dated, Dec. —, 1843.

Yours, etc.,

J. E., Solicitor for appellant.

To H. D., Esq., Sol. for comp't, }  
and to G. M. D., clerk of the }  
4th circuit. }

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No. 183.

*Petition of appeal to the court of errors.*

See Vol. I., p. 409.

[*Title of cause.*]

To the court for the correction of errors.

The petition of appeal of the above named C. D., respectfully sheweth; that a decree [*or an order*] was lately made in the court of chancery, bearing date the 6th day of July, 1843, in a certain cause pending in said court, wherein A. B. was complainant, and your petitioner [*and others*] was [*or were*] defendant [*s;*] which said decree [*or order,*] as your petitioner is advised, and every part thereof, is erroneous, and ought to be reversed. [*If the appeal is from a part of the decree only, leave out the words, and every part thereof, and add,*] so far as it directs the complainant's bill to be dismissed, without giving costs to your petitioner.

\*Wherefore this appellant respectfully prays, that [\*VOL. II, 466] the said decree [*or order,*] may be sent to the court for the correction of errors, and filed with the clerk thereof, without delay; and that the same, [*or that so much thereof, as is herein above complained of*] may be reversed; or that such other decree or order may be made by the court for the correction of errors, as shall be agreeable to equity and good conscience; and that this appellant may be restored to all things which he hath lost by the said decree [*or order.*] And this appellant, as in duty bound, will ever pray, etc.

S. B. J., Solicitor for appellant.

J. W. E., of counsel.

## No. 184.

*Order to answer petition of appeal.*

See Vol. I., p. 412.

At a court for the correction of errors, held at —, on the — day of —, 1843.

[*Title of cause.*]

On reading and filing petition of appeal in this cause, and on motion of Mr. N., of counsel for the appellant; ordered that the respondent answer said petition within eight days after service of a copy thereof, and of notice of this order, or that he be precluded from answering the said petition.

## No. 185.

*Answer to petition of appeal.*

See Vol. I., p. 413.

The answer of the above respondent to the petition of appeal, of the above appellant.

[*Title of cause.*]

This respondent not acknowledging all, or any of the matters, which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says, and admits that a decree [*or an order,*] was, on the sixth day of July, instant, made and entered by the court of chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto, when the same shall be produced. And this respondent is advised, and believes, that the said decree [*or order*] is [\*VOL. II, 467] \*agreeable to equity; and he prays that the same may be affirmed, with costs to be adjudged to this respondent.

H. K., Solicitor for respondent.

J. F., of counsel.



## No. 186.

*Points in court of errors.*

See Vol. I., p. 415.

These are similar in form, to the points on a hearing in the court of chancery. See No. 159, ante, p. 449.

## No. 187.

*Notice of argument in court of errors.*

See Vol. I., p. 416.

[*Title of cause.*]

Sir :

Take notice, that the argument of the appeal in the above cause, will be brought on at the next term of this court, to be holden at the Capitol, in the city of Albany, on the — day of — next, at 11 o'clock, A. M., or as soon thereafter as counsel can be heard.

Dated, Decémber —, 1843.

To W. H., Esq.,

Solicitor for respondent.

Yours, etc.

J. E., Solicitor for appellant.

## No. 188.

*Decree of affirmance in court of errors.*

See Vol. I., p. 420.

At a court, [*as in No. 184.*]

Present, ——— Lieutenant Governor, and 18  
Senators, Chief Justice Nelson and Justices  
Bronson and Cowen.

[*Title of cause.*]

This cause having been brought to a hearing, on an appeal from the court of chancery, and Mr. S. T., of counsel for the appellant, and

Mr. M. T. R., of counsel for the respondent, having been heard, and the questions brought up by said appeal having been duly considered, [\*VOL. II, 468] it is \*ordered, adjudged and decreed, that the decree [or order] of the court of chancery, made on the — day of —, 1843, which is appealed from [*in part*] by the appellant, be, and the same is hereby (\*) in all things affirmed [*or affirmed as to the parts thereof which are appealed from.*] with costs, to be paid by the appellant, after the same shall have been taxed. And it is further ordered that the record be remitted to the court of chancery, to the end, that this decree may be carried into execution.

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No. 189.

*Decree of reversal, in the court of errors.*

[*As in No. 188, to the (\*) then*] reversed. And it is further ordered, that the record and proceedings be remitted to the court of chancery, to the end that this decree may be carried into execution.

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No. 190.

*Remittitur.*

See Vol. I., p. 422.

State of New York :

Pleas in the court for the correction of errors, held at —, on the — day of —, 1843, before the president of the senate, the senators and justices of the supreme court of judicature of said state.

J. R. E., clerk.

[*Title of cause.*]

Be it remembered, that on the — day of —, 1843, [*time of filing petition of appeal,*] the appellant in this suit came here into the court for the correction of errors, by J. E., his solicitor and counsel, and filed

his petition of appeal, from a decree of the court of chancery of this state, in the words following, to wit: [*insert petition of appeal.*]

To which petition of appeal, the said respondent did on the —— day of ——, [*time of filing answer,*] come here into this court, by W. H., his solicitor, and M. T. R., his counsel, and filed his answer in the words following, to wit: [*insert answer to petition.*]

Whereupon, this cause having been argued by the counsel for both parties, and due deliberation being thereupon had, this court did order, adjudge and decree that [*insert decree of court of errors.*]

\*Therefore it is considered that the decree aforesaid, [\*VOL. II, 469] of the chancellor, be affirmed: and that the appellant pay to the respondent the costs of defending said appeal, to be taxed. And hereupon the record and proceedings aforesaid, as also the judgment of the said court, are remitted to the court of chancery to be proceeded upon according to law.

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No. 191.

*Notice of filing remittitur, etc.*

See Vol. I., p. 423.

[*Title of cause.*]

Sir:

Take notice, that on the first Tuesday of January next, at the Capitol, in the city of Albany, on the opening of the court, or as soon thereafter as counsel can be heard, I intend to file with the register of this court, the remittitur in the above cause from the court of errors, and to ask for an order, [*specify the order to be asked for,*] or for such other, or further order as the chancellor may deem proper to carry into effect the decree of the court for the correction of errors, made upon the appeal in this cause.

Dated, etc.

Yours, etc.

W. H., Solicitor for respondent.

To J. E., Esq.,

Solicitor for appellant.

No. 192.

*Order on filing remittitur.*

See Vol. I., p. 423.

At, etc. [*as in No. 6.*][*Title of cause.*]

On reading and filing remittitur, from the court for the correction of errors in this cause, on motion of J. E., solicitor for the complainant, and on hearing Mr. W. H., solicitor for defendant, it is ordered that the decree of the court for the correction of errors, be, and the same is hereby made a decree of this court. And further [*if any special directions are given, insert them here.*]

[\*VOL. II, 470]

\*No. 193.

*Appeal from a surrogate.*

See Vol. I., pp. 424, 427.

Saratoga County. In Surrogate's Court.

Before J. W. T., Surrogate.

In the matter of E. S., adm'r etc., of J. W., deceased, in accounting, etc., upon the application of C. W.
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A sentence or decree having been entered in the office of the surrogate of the county of Saratoga, on the — day of —, 1843, in the above matter; and the said E. S., adm'r, etc., conceiving himself aggrieved by the said sentence or decree, doth hereby appeal from the same, and every part thereof, to the chancellor: and prays that the pleadings, proofs and proceedings may be transmitted to the court of chancery, to the end that such order may be made thereupon, as shall be just.

J. C., Proctor and solicitor  
 for appellant.

No. 194.

*Bond, on appeal from a surrogate.*

See Vol. I., p. 425.

[As in No. 176, (except as to amount of penalty) to, and including the date, then]

Whereas the above named C. D. has appealed to the chancellor, from an order [or decree] of the surrogate of the county of Saratoga, made on the — day of —, 1843, in the matter [insert the title of the proceedings,]

Now, therefore, the condition of this obligation is such, that if the said appellant shall diligently prosecute his said appeal, to effect, and shall pay all costs that shall be adjudged against him by the court of chancery, on the said appeal, then this obligation to be void; otherwise to be and remain in full force and virtue.

[\*VOL. II, 471]

No. 195.

*Petition of appeal from a surrogate.*

See Vol. I., p. 425.

IN CHANCERY,  
Before the Chancellor.

E. S., adm'r, etc. of J. W., deceased, appellant,	}
v.	
C. W. and others, respondents.	

To the Chancellor of the state of New York:

The petition of E. S., administrator, etc., appellant, respectfully sheweth:

That heretofore the above named appellant, was in due form, by the surrogate of the county of Saratoga, in the state of New York, appointed administrator; and letters of administration were accord-

ingly granted on the goods, chattels, and credits of J. W., late of Baton Rouge, in the state of Louisiana, deceased.

That your petitioner afterwards, upon the application of C. W., as one of the next of kin of said J. W., was cited by said surrogate to account as such administrator. Upon which citation your petitioner desired of said surrogate, as is provided for by the statute, that such account might be finally settled; which was accordingly ordered. That thereupon an account, duly verified, was rendered to the said surrogate by the said administrator; which being unsatisfactory to C. W., the respondent, as one of the next of kin of the decedent, the same was controverted by the said respondent, and affirmed to be sufficient by your petitioner. An issue being thus formed, the respective parties proceeded before the said surrogate, with evidence written and oral, on the part of the respondent to impeach, and on the part of the appellant to sustain, their respective allegations on such accounting.

That after the said proof was taken, and a hearing was had upon the matter, before such surrogate, a sentence or decree was pronounced by him on the — day of —, 1843; by which the appellant, administrator as aforesaid, was ordered and directed to pay to the said C. W., the respondent, his distributive share of the estate of the decedent, as one of the next of kin, the sum of \$—, and the sum of \$— for costs.

This appellant being advised that the said sentence or decree is erroneous, hath appealed therefrom to this court; and states, among other grounds of error therein, the following:

*\*First.* That the surrogate has assumed and exercised [\*Vol. II, 472] jurisdiction on the subject matter in this case, when by law, jurisdiction of the same belonged exclusively to the courts of Louisiana.

*Second.* That the surrogate has decreed that the sum of \$— received by the appellant of the Delafields, was assets in his hands, when in fact, the said money was the individual property of the said administrator, either by gift of the intestate, consummated by delivery of rum, etc. to the Delafields, or in virtue of his marital right as husband of S. C. S., to whom the same had been adjudged by the probate court at Baton Rouge.

*Third.* That the surrogate has rejected the claim by the administrator for \$— paid H. V., and \$— paid J. C., as extra counsel fees, for advice and counsel to such administrator, and for arguing this case before the said surrogate; whereas the said charges were legal and

reasonable, and ought to have been allowed to the said administrator, as a charge upon the estate, on his accounting before the said surrogate.

*Fourth.* That the surrogate has allowed interest to the respondent against the appellant, from the time of the demand; whereas by the laws of Louisiana interest is not demandable in a case like the present, of the heir who is received and to whom the property is adjudged; and for that reason it cannot be allowed here against the administrator.

*Fifth.* That the surrogate has decreed and charged on the administrator personally \$—— for the costs of the respondent in this matter; when in fact such costs should have been charged neither on the administrator personally, nor on the estate, but should have been charged to, and defrayed by, the said respondent exclusively.

Your petitioner therefore prays that the said C. W., A. H. and J. T., who are intended to be made parties respondents to this appeal, may be required to answer this petition. And that the proceedings and decree in the above matter, in the surrogate's court, may upon this appeal be reviewed by your honor; and that the sentence or decree aforesaid, for the errors aforesaid, or for other errors, may be reversed, modified, or amended, as may be agreeable to equity.

And your petitioner will ever pray, etc.

E. S., Administrator, etc.

Dated, etc.

J. C., Solicitor and of  
counsel for appellant.

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[\*VOL. II, 473]

\*No. 196.

*Order to answer petition of appeal.*

See Vol. I., p. 428.

At, etc. [*as in No. 6.*]

[*Title of cause.*]

On reading and filing due proof that the petition of appeal together with the transcript of the proceedings before the surrogate, have been duly filed in the office of the register of this court, and on motion of Mr. C., solicitor for the appellant, ordered that the respondent answer

the said petition within twenty days after service of a copy of said petition and notice of this order, or that in default thereof the appellant be heard *ex parte*.

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No. 197.

*Answer to petition of appeal.*

See Vol. I., p. 430.

[*Title of cause.*]

The answer of C. W., respondent, to the petition of appeal of E. S. administrator of the goods, chattels and credits of J. W., deceased, appellant.

This respondent admits that a sentence or decree of the date, tenor and effect in the said petition of appeal set forth, was made by the surrogate of the county of Saratoga. And this respondent is advised and believes and submits, that such sentence or decree, so far as the same is complained of by the said petition of appeal, is just and agreeable to equity. And he therefore prays that the said sentence or decree, with the exceptions hereinafter pointed out and specified, may be affirmed; and that as to those matters the said petition of appeal may be dismissed by this honorable court, with costs to be adjudged to this respondent.

And this respondent being so advised, supposes the said sentence or decree to be erroneous as against him this respondent. And he specifies the following items, among other grounds of error, against the respondent, to wit:

*First.* That the surrogate has allowed interest to the claimant, against the administrator, from the time of the demand by claimant, only; whereas the claimant should have been allowed interest from the time the administrator received and used the property in question, as his own.

*Second.* That the sum of one thousand dollars, received in 1831, by the administrator or his wife, from the deceased, with interest thereon, [\*VOL. II, 474] \*was rejected by the surrogate, when the same should have been allowed.

And as to the matters in the said sentence or decree above specified



by this respondent, he says that he is advised and believes that the said sentence or decree, in respect to those matters, is erroneous and ought to be reversed.

C. W.

H. R. M., Solicitor and of counsel  
for respondent.

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No. 198.

*Petition of appeal to the chancellor from a circuit judge.*

See Vol. I., p. 437.

[*Title of cause.*]

To the Chancellor of the State of New York.

The petition of appeal of the above named C. D. respectfully showeth,

That a decision was lately made by the honorable J. W., circuit judge of the 4th circuit, on an appeal to him from a sentence or decree of the surrogate of the county of Saratoga, in the matter of the application of A. B. to prove the will of E. B. as a will of personal estate; which said decision of such circuit judge bears date the — day of —, 1843, and in and by which decision the said circuit judge affirmed the sentence or decree of the said surrogate, and ordered and directed the said will to be admitted to probate as a will of personal estate.

And your petitioner being advised that the said decision of the said circuit judge is erroneous, hath appealed therefrom to this court.

Your petitioner therefore prays that the said A. B. together with G. H. and Ann his wife, J. K. and L. M., who are interested in the proof of the said will, and who are intended to be made parties respondents to this appeal, may be required to answer this petition. And that a day may be fixed by your honor for the parties to be heard in this court upon this appeal; to the end that due notice of the hearing may be given to such of the parties as are entitled to appear to sustain the decision appealed from. And that the decision of the said circuit judge, above complained of may upon this appeal be reviewed by your honor, and that it may be reversed, modified or amended, as may be agreeable to equity.

And your petitioner, etc.

[\*Vol. II, 475]

## \*CHAPTER II.

## EXECUTION OF DECREE.

No. 199.

*Writ of assistance.*

See Vol. I., p. 441.

The people of the state of New York, to the sheriff of the [L. s.] county of Saratoga, greeting: Whereas, by a certain decree [or decretal order] of our court of chancery, in a certain cause there depending between A. B. complainant and C. D. defendant, made at a court of chancery held for the state of New York at the town of Saratoga Springs, on the — day of —, in the year one thousand eight hundred and forty-three, before the chancellor, [or before the vice-chancellor of the 4th circuit,] it was, among other things therein contained, ordered, adjudged, and decreed by the said court, that the said complainant should be forthwith put into possession of a certain farm or lot of land situate in the town of Day in said county, known as lot No. 160 in the Kayaderosseras patent; and whereas the said complainant has not been let into, nor taken possession of the said farm or lot of land, or any part thereof, according to the tenor of the said decree; and whereas the said farm or lot of land is in the tenure and occupation of the said defendant; whereas, by an order of our said court of chancery made in the said cause, on the — day of —, it was ordered that our writ of assistance should issue to you the said sheriff, to put the complainant in possession of the said farm or lot of land, and him in such possession thereof from time to time to maintain and defend. Therefore we command you, that immediately after receiving this writ you go to, and enter upon the said farm or lot of land, and that you eject and amove therefrom all and every person or persons holding and detaining the same, or any part thereof, against the said complainant; and that you put and place the said complainant, or his assigns, in the full, peaceable, and quiet possession of the said farm or lot of land without delay; and him the said complainant in such possession thereof from time to time maintain, keep,

and defend, or cause to be kept, maintained and defended, according to the tenor and true intent of the said decree and order of our said [\*Vol. II, 476] court. Witness Reuben H. Walworth, chancellor of \*our said state, at the town of Saratoga Springs, the — day of —, in the year one thousand eight hundred and forty-three.

J. E., Solicitor.

J. M. D., Register.

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No. 200.

*Writ of execution to enforce the payment of money.*

See Vol. I., p. 441.

[L. s.] The people of the state of New York, to the sheriff of the county of Saratoga, greeting: Whereas, on the — day of —, in the year one thousand eight hundred and forty-three, by a certain decree made in our court of chancery, before our chancellor [*or before our vice-chancellor of the fourth circuit,*] at the town of Saratoga Springs, in a certain cause depending in our said court, wherein A. B. is complainant, and C. D. is defendant, it was ordered, adjudged and decreed, that (\*) the said C. D. should pay to the said A. B. the sum of \$—, besides the costs of the said suit, to be taxed; as by the said decree remaining as of record in our said court of chancery, doth, and may more fully appear: and whereas the costs so decreed to be paid to the said A. B., amount to the sum of \$—, as taxed in our said court of chancery. And whereas, the said C. D. hath neglected to comply with all and singular the matters required of him, in, and by the said decree, as we have been informed in our said court of chancery.(f) Now, therefore, in order that full and speedy justice may be done in the premises, we command you, that of the goods and chattels of the said C. D. in your bailiwick, you cause to be made the sum of \$—, which in our said court of chancery, before our said [*vice*] chancellor, was decreed to the said A. B., as aforesaid; and also the sum of \$—, for his costs so decreed to him as aforesaid. And if sufficient goods and chattels of the said C. D. cannot be found in your bailiwick, that then you cause the said sum so decreed as aforesaid, and the costs aforesaid, to be made of the lands and tenements of the said C. D., whereof he was seized on the — day of —, [*the day of docketing the decree, if it has been docketed,*] or at any

time since, in whosever hands the same may be. And have you those moneys before our said chancellor [*or vice-chancellor of the fourth circuit*] in our said court of chancery, on the — day of — next, wheresoever the said court shall then be, to render to the said A. B. according to the decree aforesaid; and have you [\*VOL. II, 477] then \*and there this writ, and make and return a certificate under your hand of the manner in which you shall have executed the same. Witness [*as in last form.*]

*Endorsed*—"By the Court."

J. M. D., Register.

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No. 201.

*Execution in the nature of a testatum Fi. Fa. for residue.*

[*As in last form to the (†), then proceed.*] And whereas by our writ we lately commanded our sheriff of the county of Oneida that of the goods and chattels, lands and tenements of the said C. D. in his bailiwick he should cause to be made the said sum of \$—, which in our said court of chancery before our said [*vice*] chancellor was so decreed to the said A. B. as aforesaid, and also \$— for his costs so decreed to him as aforesaid, and that he should have those moneys before our chancellor [*or vice-chancellor of the 4th circuit*] in our said court of chancery, on a certain day now past, to render to the said A. B. according to the decree aforesaid. And our said sheriff of the county of Oneida, on that day returned to our said court that by virtue of our said writ to him directed and delivered, he had caused to be made of the goods and chattels, lands and tenements of the said C. D. the sum of \$—, part of the moneys in the said writ mentioned, and that the said C. D. had not any other goods and chattels, lands or tenements in his bailiwick whereof he could cause to be levied the residue of the moneys mentioned in the said writ, or any part thereof. And because it is sufficiently certified to us, in our said court of chancery, before our said [*vice*] chancellor, that the said C. D. has sufficient goods and chattels or lands and tenements in your bailiwick, whereof you could cause to be made the residue of the moneys so decreed to be paid to the said A. B. as aforesaid: Now, therefore, in order that full and speedy justice may be done in the premises, we command you that of the goods and chattels of the said C. D. in your bailiwick you cause to be made

§—, the residue of the moneys so decreed to be paid as aforesaid; and if sufficient goods and chattels of the said C. D. cannot be found in your bailiwick, that then you cause the said sum of §—, residue of the moneys so decreed to be paid as aforesaid, to be made of the lands and tenements of the said C. D. whereof he was seized on the — day of —, [*the time of docketing the decree,*] or at any time since in whosever hands the same may be; and you have those moneys before our said [*vice*] chancellor in our said court of chancery, on the — [\*VOL. II, 478] day of — next, wheresoever the said court shall \*then be, to render to the said A. B. according to the decree aforesaid. And have you then there [*conclude as in No. 200.*]

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No. 202.

*Execution for costs on dismissal of bill.*

[*As in No. 200 to the (\*), then*] the bill of the complainant in the said cause should be dismissed with costs to be paid by him to the defendant because of his unjust vexation in the premises; as by the said decree remaining as of record in our said court of chancery doth, and may more fully appear. And whereas the costs and charges of the said C. D. for his said unjust vexation, and so decreed to be paid to him by the said A. B. amount to the sum of §— as taxed in our said court of chancery;(\*) now, therefore, we command you that of the goods and chattels of the said A. B. in your bailiwick, you cause to be made the said sum of §— for the costs and charges aforesaid; and if sufficient goods and chattels of the said A. B. cannot be found in your bailiwick, that then you cause the said costs and charges to be made of the lands and tenements of the said A. B. whereof he was seized on the — day of —, [*the day of docketing the decree,*] or at any time since, in whosever hands the same may be; and have you those moneys before our said chancellor [*or vice-chancellor of the fourth circuit*] in our said court of chancery, on the — day of — next, wheresoever our said court shall then be, to render to the said C. D. for his said costs and charges according to the decree aforesaid. And have you then and there, etc. [*conclude as in No. 200.*]

## No. 203.

*Execution for sum decreed, and costs, after affirmance by the court of errors.*

The people of the state of New York to the sheriff of the [L. s.] county of Saratoga, greeting: Whereas, on the — day of —, in the year one thousand eight hundred and forty-two, by a certain decree made in our court of chancery, before the chancellor of our said state, at the city of Albany, in a certain cause depending in our said court wherein A. B. is complainant and C. D. is defendant, it was ordered, adjudged and decreed, [*set out the decree;*] as by the said decree remaining as of record in our said court of chancery doth, and may more fully appear. And whereas, on an appeal [\*VOL. II, 479] by the said \*defendant from the said decree to our court for the correction of errors, it was, on the — day of —, in the year one thousand eight hundred and forty-three, ordered, adjudged, and decreed, by our said last mentioned court, that the said decree of our said court of chancery be affirmed; and that the appellant pay to the respondent the further sum of \$—, for the interest due on the sum so decreed by our said court of chancery to be paid by the said defendant, and also the costs of the respondent in defending the said appeal; which costs amount to the further sum of \$—, as taxed in our said court of chancery; which said several sums, including also the sum of \$— for the costs of the said A. B. in our said court of chancery, amount to the sum of \$—. Now therefore, in order that full and speedy justice may be done in the premises, we command you that of the goods and chattels of the said C. D. in your bailiwick, you cause to be made the said sum of \$—, which before our chancellor in our said court of chancery was decreed to the said A. B. in pursuance of the decree of our said court for the correction of errors as aforesaid. And if sufficient goods and chattels of the said C. D. cannot be found in your bailiwick, that then you cause the said sum of \$— to be made of the lands and tenements of the said C. D. whereof he was seised on the — day of —, [*The time of docketing the decree*] or at any time since, in whosever hands the same may be; and have you those moneys before our chancellor, in our said court of chancery, on the — day of — next, wheresoever the said court shall then be, to render to the said A. B., according to the decrees aforesaid. And have you then there, etc. [*Conclude as in No. 200.*]

## No. 204.

*Ca. sa. for costs on dismissal of bill.*

[*As in No. 200 to the (\*), and in 202 to the (\*), then*] Now therefore, we command you that you take the body of the said A. B., if he shall be found in your bailiwick, and him safely keep in your custody until he shall pay the costs and charges aforesaid, together with your fees on this execution. And you are to make and return to our said chancellor [*or vice-chancellor of the fourth circuit,*] in our said court of chancery, on the — day of — next, wheresoever our said court shall then be, a certificate under your hand, of the manner in which you have executed this writ. Witness, etc. [*as in No. 199.*]

[\*VOL. II, 480]

\*No. 205.

*Execution in the nature of a ca. sa. to compel the performance of a specific duty.*

The people, etc. to the sheriff of the county of Saratoga, [L. s.] greeting: Whereas on the — day of — in the year, etc., by a certain decree made in our court of chancery before our vice-chancellor of the fourth circuit, at etc. in a certain cause depending in our said court wherein A. B. is complainant and C. D. is defendant, it was ordered, adjudged and decreed, that [*set out the decree, or so much thereof as is necessary to explain the duty to be performed*] as by the said decree remaining as of record in our said court of chancery doth and may more fully appear. And whereas the said C. D. hath neglected to comply with all and singular the matters required of him in and by the said decree, as we have been informed in our said court of chancery. Now therefore, in order that full and speedy justice may be done in the premises, we command you that you take the body of the said C. D. if he shall be found in your bailiwick, and him safely keep in your custody until he shall perform and fulfil all and singular the matters required of him in and by the said decree, and pay your fees on this execution, or until our said court of chancery shall make other order to the contrary. And you are to make and return [*conclude as in last form.*]

## CHAPTER III.

## PROCEEDINGS UNDER DECREES AND ORDERS.

No. 206.

*Notice of motion for an issue at law.*

See Vol. I., p. 446.

[*Title of cause.*]

[*As in No. 121 to the asterisk, (\*) then*] issues at law may be awarded in this cause for the trial, by a jury, of the matters in controversy therein. [*Conclude as in No. 121.*]

[\*Vol. II, 481]

\*No. 207.

*Order for an issue at law, where the issue is settled by the court.*

See Vol. I., p. 446.

[*Title of cause.*]At, etc. [*as in No. 6.*]

On reading and filing the affidavit of B. R. W., solicitor for the complainant, showing that this cause is at issue upon a replication to the answers of the defendants P. S. and J. S., and is in readiness to take testimony therein, the bill having been taken as confessed against the defendant P. M., and the cause standing for hearing upon bill and answer as to the defendant J. D., and on reading and filing a notice of motion on the part of the defendant P. S. for an issue or issues in this cause to be tried by a jury, and an affidavit of the due service of such notice upon the solicitor for the complainant and upon the solicitor of the defendant J. S., and on hearing A. T., of counsel for the defendant, P. S., and B. R. W., as counsel for the complainant, on the said motion, no one appearing on the part of the defendant J. S., it is ordered that issues be and they are hereby awarded in this cause between the complainant and the defendants P. S. and J. S., to try the



matters of fact in dispute between them, by a jury. It is further ordered that the said issues be tried at the circuit court in and for the county of Rensselaer, and that upon the trial of the said issues, the defendant P. M., may be examined as a witness for either party, in case it shall appear to the court before which the trial is had that he is not interested in the event of this suit in favor of the party calling him as a witness; that the issues between the complainant and the defendant P. S., be: 1st. Whether the said P. S. executed the bond and mortgage mentioned in the complainant's bill; 2. Whether the complainant executed the release of the said bond and mortgage, as stated in the answer of the defendant P. S.; and that the complainant hold the affirmative upon the first question, and the defendant P. S., the affirmative upon the second question; that the issue between the complainant and the defendant J. S. be, whether the release of the farm of the said defendant, from the lien of the mortgage mentioned in the complainant's bill, was obtained by the said J. S., fraudulently, as alleged in the bill? and that the complainant be considered as holding the affirmative of the last mentioned issue, upon the trial thereof. It is further ordered that upon the trial of the issues between the complainant and the defendant P. S., either party may read the sworn answer of the said P. S.

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[\*VOL. II, 482]

\*No. 208.

*Order for an issue where it is referred to a master to settle the form of the issues.*

See Vol. I., p. 447.

At, etc. [*as in No. 6.*]

[*Title of cause.*]

On reading and filing the affidavit, etc. [*as in last form*] it is ordered that an issue be, and the same is hereby awarded in this cause between the complainant and the defendant E. F., to try the matters in dispute between them by a jury; that the said issue be tried before such circuit court, court of common pleas, or in the superior court of the city of New York, as the master hereinafter mentioned shall direct; upon which trial either party may read the sworn answer of the said E. F., to the bill in this cause, and may examine the defendant

C. D., as a witness, in case it shall appear to the court before which the trial is had, that he is not interested in the event of this suit, in favor of the party calling him as a witness. And it is further ordered that it be referred to P. G. E., one of the masters of this court residing in the county of Saratoga, to settle the form of the issue or issues to be tried, in the manner directed by the sixty-seventh rule of this court, and to determine in what court such issues shall be tried.

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No. 209.

*Report of master settling issues at law, etc.*

See Vol. I., p. 447.

[*Title of cause.*]

To the Chancellor of the state of New York.

In pursuance of an order of this court made in the above entitled cause, on the — day of —, 1843, by which it was referred to one of the masters of this court residing in the county of Saratoga to settle the form of the issues at law awarded by said order, for the trial of the matters in controversy in this cause between the complainant and the defendant E. F., by a jury, in the manner directed by the 67th rule of this court, and to determine in what court such issues should be tried;

I, the subscriber, one of the masters of the said court residing in the county of Saratoga, do respectfully certify and report, that having been charged by the complainant's solicitor with the execution of the said order of reference, I have been attended by the solicitors for the [\*VOL. II, 483] respective \*parties and have looked into the pleadings in this cause, and have settled the form of the issues to be tried, upon the following interrogatories to be answered by the verdict of the jury upon the trial thereof, viz.: [*insert the interrogatories.*]

And I further report, that upon the trial thereof the complainant is to be considered as holding the affirmative of the first question, and the defendant the negative; and the defendant the affirmative of the second question and the complainant the negative.

And I further certify and report, that I am of opinion that the convenience of the parties and their witnesses will be best promoted by

directing the said issues to be tried at the next circuit court to be held in and for the county of Saratoga on the first Monday of January next.

All which is respectfully submitted.

Dated —, 1843.

P. G. E., Master in chancery.

No. 210.

*Order for a feigned issue.*

See Vol. I., p. 463.

At, etc. [*as in No. 6.*]

[*Title of cause.*]

This cause having been brought on to be heard upon the pleadings filed and the proofs taken therein, and the said pleadings and proofs having been read, and Mr. S. W. of counsel for the complainant and Mr. F. K. of counsel for the defendant, having been heard, it is ordered, adjudged and decreed, and this court by virtue of the power and authority thereof, doth order, adjudge and decree, that a feigned issue be formed and tried between the parties by a jury of the country, at the next circuit court to be held in and for the county of Saratoga, on the first Monday of January next, to inquire, and determine whether the deed mentioned in the pleadings in this cause, bearing date the — day of —, 1840, and purporting to have been executed by J. H. and E. his wife to the complainant, was executed by the said J. H. and E. his wife; and whether the same was delivered by the said grantors to the grantee therein. And it is further ordered that the solicitor for the complainant in this suit do make up the said issues and serve a copy thereof upon the defendant's solicitor without unnecessary delay; that unless the form of such issues shall be agreed upon by the solicitors for the respective parties within ten days after such service thereof, then that it be referred to one of the masters of [\*Vol. II, 484] this court residing in the county of \*Saratoga to settle the said issues and to report the same to this court. And it is further ordered, adjudged and decreed, that on the trial of the said feigned issues either party is to be at liberty to examine any witnesses whose testimony was read upon the hearing of this cause, or to read their depositions heretofore taken, if they are dead, or out of the jurisdiction of the court. And either party is also to be at liberty to read the

deposition or any witness of the opposite party, which was read on the hearing of this cause. That the said issues be so framed that the complainant in this cause may hold the affirmative of the several questions above stated; and he is to be at liberty to open and close the argument on the trial. Either party is to be at liberty to notice the cause for trial; and neither party is to be at liberty to put it off, without sufficient cause shown, and on the usual terms.<sup>(a)</sup> And all further directions are reserved until after the trial of the said issues.

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No. 211.

*Declaration upon a feigned issue.*

Supreme Court.

Of October term, in the year one thousand eight hundred and forty-three.

*Saratoga county, ss.:* John Doe, plaintiff in this suit by J. E. his attorney, complains of Richard Roe, defendant in this suit, of a plea of trespass on the case upon promises. For that whereas, on the — day of —, in the year one thousand eight hundred and forty-three, at Saratoga Springs, in the county aforesaid, a certain discourse was moved and had, by and between the said John Doe and the said Richard Roe, of, and concerning a certain paper writing, purporting to be a deed of conveyance of the lands therein described, from J. H. and E. his wife to A. B., and bearing date the — day of —, 1840; and which said deed or paper writing, is set forth and described in the pleadings in a certain cause depending in the court of chancery of the state of New York, wherein A. B. is complainant and C. D. is defendant; and upon that discourse a question then and there arose, and was debated between the said John Doe and the said Richard Roe, whether the said deed or paper writing, was executed and delivered by the said J. H. and E. his wife. And upon such discourse [\*VOL. II, 485] the said John Doe then and there asserted \*and affirmed that the said deed or paper writing above mentioned was executed and delivered by the said J. H. and E., his wife; which assertion the said Richard Roe then and there denied to be true, and asserted to the contrary thereof; and, thereupon, afterwards to wit:

(a) See *Apthorp v. Comstock*, 2 Paige, 485.

On the same day and year first above mentioned, at the place in the county aforesaid, in consideration that the said John Doe, at the special instance and request of the said Richard Roe, had then and there paid to the said Richard Roe, the sum of one hundred dollars, lawful money, he the said Richard Roe undertook, and then and there faithfully promised the said John Doe, to pay to him the sum of one hundred dollars, like lawful money, in case the said deed or paper writing was executed and delivered by the said J. H. and E., his wife, as he the said John Doe had asserted as aforesaid. And the said John Doe, in fact, saith, that the said deed or paper writing was executed and delivered by the said J. H. and E., his wife, as he the said John Doe had asserted and affirmed, to wit: On the day and year, and at the place in the county aforesaid, of which the said Richard Roe, afterwards to wit: on the day and year, and at the place in the county aforesaid, had notice. By reason whereof the said Richard Roe became liable to pay to the said John Doe, and ought to have paid to him the said sum of one hundred dollars, whereof the said Richard Roe then and there had notice; and being so liable, he the said Richard Roe in consideration thereof, afterwards to wit: on the day and year, and at the place in the county aforesaid, undertook, and then and there faithfully promised the said John Doe, to pay him the said sum of money, when he the said Richard Roe should be thereunto afterwards requested. Nevertheless, the said Richard Roe, not regarding his said promise, and undertaking by him in form aforesaid made, hath not as yet paid to the said John Doe the said sum of one hundred dollars, or any part thereof, although so to do the said Richard Roe was requested by the said John Doe, afterwards, to wit: on the same day and year last aforesaid, and often afterwards, to wit: at the place in the county aforesaid; but to pay the same to the said John Doe, the said Richard Roe hath hitherto altogether refused, and still doth refuse, to the damage of the said John Doe, of one hundred dollars, and therefore he brings suit, etc.

J. E., Plaintiff's attorney.

[\*VOL. II, 486]

\*No. 212.

*Plea upon a feigned issue.*[*Title of cause.*]

And the said Richard Roe, by W. H. his attorney, comes and defends the wrong and injury, when, etc., and says, that the said John Doe ought not to have or maintain his aforesaid action thereof against him, because he says that though true it is, that the said discourse was had and moved by and between the said John Doe, and him the said Richard Roe, wherein the question did arise, as aforesaid, and that he the said defendant, did undertake and promise, in manner and form as the said John Doe hath above in that behalf alleged; nevertheless, for plea in this behalf, the said Richard Roe saith, that the said J. H. and E., his wife, did not execute and deliver the said deed or paper writing in the said plaintiff's declaration mentioned at the time in that behalf mentioned in the said declaration, nor at any other time; and of this the said defendant puts himself upon the country, and the said plaintiff doth the like, etc.

W. H., Defendant's attorney.

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 No. 213.
*Notice of hearing on further directions after trial of feigned issue.*

See Vol. I., p. 464.

[*Title of cause.*]

Sir:

Take notice that this cause will be brought to a hearing for further directions upon the pleadings in the feigned issue framed therein, and upon the certified copy of the minutes of the trial of such feigned issue, annexed thereto, and filed in the office of the register of this court, at the next term of this court, to be held at the capitol in the city of Albany, on the — day of January next.

Dated December —, 1843.

To W. H., Esq.,

Solicitor for defendant.

Yours, etc.

J. E., Solicitor for complainant.

\*VOL. II, 487]

\*No. 214.

*Master's summons.*

See Vol. I., pp. 472, 473.

<p style="text-align: center;">A. B.</p> <p style="text-align: center;">v.</p> <p style="text-align: center;">C. D. and others.</p>	}
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In pursuance of the authority and directions contained in an order, made in the above cause, by the [*vice*] chancellor [*of the fourth circuit,*] dated on the 2d day of December, 1843, I, the subscriber, one of the masters of the court of chancery of the state of New York, do hereby summon you C. D., E. F. and G. H., to appear before me, at my office, in the village of Saratoga Springs, on the — day of January, 1844, at ten o'clock in the forenoon, to attend a hearing before me the said master, of the matters in reference in the said cause, to be had by virtue of the order of the said court of chancery above referred to: And hereof you are not to fail at your peril.

Dated the 10th day of December, 1843.

P. G. E., master in chancery.

## UNDERWRITING.

To proceed upon the settlement of the issues at law in above cause.

I direct the above summons to be served two days previous to the return day thereof.

P. G. E., master in chancery.

## No. 215.

*Interrogatories for the examination of parties before a master.*

See Vol. I., p. 484.

[*Title of cause.*]

Interrogatories exhibited before P. G. E., Esq., the master, to whom this cause stands referred, for the examination of E. F., a defendant in this cause

on behalf of the above named complainant, pursuant to the decree made on the hearing of this cause.

*First interrogatory.*—Whether or no, etc.

*Second interrogatory.*—Did you know, etc.

J. E., compl'ts sol'r.

Settled and allowed.

P. G. E., master in chancery.

[\*VOL. II, 488]

\*No. 216.

*Certificate of allowance of interrogatories for the examination of a party.*

See Vol. I., p. 485.

[*Title of cause.*]

In pursuance of the decree made on the hearing of this cause, bearing date the — day of —, 1843, I have been attended by the solicitors for the several parties, and have perused, settled, and allowed a set of interrogatories for the examination of E. F., one of the defendants in this cause, touching the inquiries directed by the said decree. And in testimony thereof, I have signed my name underneath the engrossment of the said interrogatories, which I certify, and submit to this honorable court.

Dated Dec. —, 1843.

P. G. E., master in chancery.

No. 217.

*Certificate of examination not having been brought in.*

[*Title of cause.*]

Whereas it appears by my certificate made in this cause, bearing date the — day of December, instant, that interrogatories had been exhibited before me, on behalf of the above named complainant, for the examination of E. F., one of the defendants in this cause, touching the inquiries directed by the said decree; which I had settled and allowed: Now, at the request of Mr. J. E., the solicitor for the said complainant, I do hereby certify (\*) that the said defendant E. F. hath



not put in any answer and examination to the said interrogatories; although he hath been duly summoned for that purpose. All which I certify and submit to this honorable court.

Dated, etc.

P. G. E., master in chancery.

No. 218.

*Examination of a party upon interrogatories.*

See Vol. I., p. 487.

[*Title of cause.*]

The answer and examination of the above named defendant E. F., to interrogatories exhibited on behalf of the above named complainant, and allowed by P. G. E., one of the masters of this honorable [\*VOL. II. 489] court, to whom this \*cause stands referred, pursuant to a decree made on the hearing thereof, bearing date the — day of —, 1843.

To the first interrogatory this examinant saith, that he hath, in the first schedule to this his answer and examination annexed, and which he prays may be deemed and taken as a part thereof, set forth, according to the best of his knowledge, remembrance, information and belief, a full, true and particular account of all the personal estate and effects which J. S., the testator in the pleadings of this cause named, was possessed of, entitled to, or interested in, at the time of his death, and which are not specifically bequeathed by his will, and all the particulars whereof the same consisted, and the full, true and utmost value thereof, and all the particulars thereof.

To the second interrogatory, this examinant saith, that he hath, in the second schedule to this his answer and examination, and which he prays may be taken and considered as part thereof; given a full, true, and particular account of all sum and sums of money, and the times when, and the persons from whom the same have been received by this examinant, or by any person or persons by his order, or for his use; and also an account of all and every sum and sums of money received by sale, or on account of the said testator's personal estate and effects, (not specifically bequeathed,) and from and by whom; and when, and on what account the same and every part thereof were,

or was so received; and what parts, and to what value and amount the said personal estate and effects of the said testator remain undisposed of, and what is become thereof.

To the third interrogatory this examinant saith, that he has paid, expended, disbursed and allowed the several sum or sums of money in respect of the said testator's personal estate and effects, not specifically bequeathed, mentioned and set forth in the third schedule to this his answer and examination annexed, and which he prays may be taken and considered as part thereof: And this examinant saith that the last mentioned schedule contains a full, true, and particular account of all and every the said sum and sums of money so paid, expended, disbursed or allowed by this examinant; and the times when and to whom, and for what, and upon what account such sums of money, and every of them, were so paid, expended, disbursed or allowed.

To the fourth interrogatory, this examinant saith, that the said testator J. S., in the pleadings named, was not, to the best of this examinant's information, knowledge, or belief, at the time of his death [\*VOL. II, 490] seized or \*possessed of, or entitled to, or interested in, any freehold, copyhold or leasehold estate held for lives or years whatsoever.

Sworn before me, this  
— day of —, 1843.

P. G. E., master in chancery.

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No. 219.

*Exceptions to examination of a party.*

See Vol. I., p. 489.

[*Title of cause.*]

Exceptions taken by the complainant, to the answer and examination of the defendant E. F., to the interrogatories exhibited on behalf of said complainant, and allowed by P. G. E., the master, to whom this cause stands referred.

*First exception.*—For that the said defendant hath not answered so much of the first interrogatory as requires him to set forth and state whether, etc.

*Second exception.*—For that the said defendant hath not answered the matters of the first interrogatory, or any part thereof, to the best of his knowledge, remembrance, information or belief.

J. E., Solicitor for complainant.

S. C., of counsel.

No. 220.

*Master's certificate upon exceptions to an examination.*

See Vol. I., p. 489.

[*Title of cause.*]

Exceptions to the answer and examination of the defendant E. F., to the interrogatories exhibited on the part of the above complainant, for insufficiency, having been taken, I, the subscriber, the master to whom this cause stands referred, pursuant to a decree made on the hearing thereof, bearing date the — day of —, 1843, do certify and report.

That having been attended by the counsel of the respective parties, and having looked into the said interrogatories, and the answer and examination of the said defendant thereto, I am of opinion, that the said answer and examination is sufficient. [*Or that the said answer and* [\*VOL. II, 491] *\*examination is insufficient in the matters of the 1st and 4th exceptions, and the interrogatories on which such exceptions are founded; and that the said 1st and 4th exceptions are well taken. And I do fix the time for the said E. F. to put in a further examination to the said 1st and 4th exceptions, and to the interrogatories on which the same are founded, at twenty days after this certificate shall become absolute.*]

All which is respectfully submitted.

Dated, etc.

## No. 221.

*Notice of master's certificate being filed.*

See Vol. I., p. 489.

[*Title of cause.*]

Sir :

Take notice that the certificate of P. G. E., the master, to whom this cause stands referred, as to the sufficiency of the answer and examination of the defendant E. F., to the interrogatories exhibited on behalf of the complainant, and which certificate bears date the — day of —, was filed in the office of the register of this court on the — day of —, inst.

Dated, etc.

Yours, etc.

To J. E., Esq.,

W. H., Solicitor for defendant.

Solicitor for complainant.

## No. 222.

*Exception to master's certificate of the sufficiency of an examination.*

See Vol. I., p. 490

[*Title as in No. 2.*]

An exception taken by the said complainant to the certificate of P. G. E., the master to whom this cause stands referred, as to the sufficiency of the answer and examination of the defendant E. F. to the interrogatories exhibited on the part of the said complainant.

For that the said master has, in and by his said certificate or report, certified the said answer and examination of the defendant E. F. to be sufficient; whereas he ought to have certified and reported that the said answer and examination is insufficient.

In all of which particulars [*as in No. 103.*]

[\*Vol. II, 492]

\*No. 223.

*Order for further examination.*

See Vol. I., p. 490.

At, etc. [*as in No. 6.*][*Title of cause.*]

On reading and filing due proof of service, upon the defendant's solicitor, more than eight days since, of notice of the filing of the certificate of the master to whom this cause stands referred, as to the insufficiency of the examination of the defendant E. F. to the interrogatories exhibited on the part of the complainant, and that such certificate has become absolute against the said defendant E. F.; on motion of J. E., solicitor for the complainant, and on hearing Mr. W. H., of counsel for the defendant E. F., ordered that the said defendant do put in his further examination to the exceptions allowed by the said master, and pay the costs of such exceptions and the proceedings thereon within ——— days after service of notice of this order, or that an attachment issue against him.

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 No. 224.
*Certificate of default in putting in further examination.*

See Vol. I., p. 490.

[*As in No. 217 to the asterisk, (\*) then,*] that the defendant E. F. has not put in any answer or examination to the said interrogatories; although the time fixed for that purpose in my report bearing date the ——— day of ——— instant, [*or in the order of this court made on the ——— day of ——— instant*] expired on the ——— day of ——— instant.

All which, etc.

Dated, etc.

## No. 225.

*Order for attachment for not putting in further examination.*

See Vol. I., pp. 490, 491.

At, etc. [*as in No. 6.*]

[*Title of cause.*]

On reading and filing the certificate of the master to whom this cause stands referred, together with due proof by affidavits, showing [\*Vol. II, 493] \*the default of the defendant E. F. in not putting in his further answer and examination to the exceptions allowed by the said master, pursuant to the order of this court made on the — day of — instant, within the time limited by said order; on motion of J. E., solicitor for the complainant, and on hearing Mr. W. H., of counsel for said defendant; ordered that an attachment issue against the said defendant E. F.

## No. 226.

*Subpœna for witnesses before a master.*

See Vol. I., p. 500.

Similar in form to No. 138, ante, p. 439.

## No. 227.

*Certificate of master for commission to examine witnesses.*

See Vol. I., p. 501.

[*Title of cause.*]

I, the subscriber, the master to whom the above cause stands referred, do certify that it has been satisfactorily shown to me by the complainant, that he has three material witnesses, to wit, S. P., L. N. and J. T., who reside in the county of Steuben, more than forty miles from my office, whose testimony is essential to him upon the matters of the reference before me in this cause. And I do certify that in my opin-

ion a commission is necessary to take the testimony of the said witnesses, to be directed to some master or examiner of this court residing in said county of Steuben.

All which, etc.

Dated, etc.

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No. 228.

*Order for commission on above certificate.*

At, etc. [*as in No. 6.*]

[*Title of cause.*]

On reading and filing the certificate of P. G. E., the master to whom this cause stands referred, showing that a commission is necessary for the examination of witnesses on the part of the complainant, residing in the county of Steuben, and on motion of Mr. J. E., solicitor for the complainant, ordered that a commission be issued for the examination [\*VOL. II, 494] \*of S. P., L. N. and J. T., as witnesses on the part of the complainant, to be directed to some master or examiner of this court residing in said county of Steuben. And it is further ordered that notice of this order be given to the solicitor for the defendant; and that if such defendant does not join in the said commission and propose the names of commissioners on his part, within — days from the date of this order, the said complainant may have such commission directed to his own commissioners.

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No. 229.

*Interrogatories for the examination of witnesses before a master.*

See Vol. I., pp. 501, 502.

[*Title of cause.*]

Interrogatories to be exhibited by the complainants before P. G. E., the master to whom this cause stands referred, for the examination of witnesses before the said master, on the part and behalf of the complainants, in pursuance of the decree made on the hearing of this cause, bearing date the — day of —, 1843.

*First interrogatory.*—Do you know the parties, complainants and defendants, in the title of these interrogatories named, or any or either, and which of them, and how long have you known them respectively, or such of them as you do know? Declare the truth of the several matters inquired of by this interrogatory, according to the best of your knowledge, remembrance, information and belief, with your reasons fully and at large.

*Second interrogatory.*—Whether or no have you, etc.

*Lastly.*—Do you know, or can you set forth any other matter or thing which may in any wise tend to the benefit of the complainants or any or either of them in this cause? If so, set forth the same, and all the circumstances and particulars thereof, according to the best of your knowledge, remembrance and belief, with your reasons at large.

Settled and allowed.

J. E., Solicitor and of  
counsel for complainant.  
P. G. E., Master in chancery.

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No. 230.

*State of facts and charge.*

See Vol. I., p. 503.

[*Title of cause.*]

The state of facts and charge of J. T., a specialty creditor of T. W. deceased, the testator in the pleadings named.

\*The said J. T. states, that the said T. W. and R. [\*VOL. II., 495] W., of —, etc. gentleman, and one of the defendants in this cause, on the — day of —, 1830; having occasion for money, applied to him the said J. T., to advance them the sum of \$500, upon the security of their bond; which the said J. T. did advance and lend accordingly; and the said T. W. and R. W. gave the said J. T. their bond for the same, bearing date the — day of —, 1830, whereby the said T. W. and R. W., for themselves and each of them, jointly and severally, their, and each of their heirs, executors, and administrators, became bound to the said J. T. in the sum of \$—, conditioned for the pay-



ment of the sum of \$500, with interest for the same, after the rate of 7 per cent per annum, on demand.

That no interest was paid on the said bond up to the 5th day of March, 1831: when a settlement of the account up to that time, was made between the said J. T. and the said T. W. and R. W., whereby it was settled and agreed between them, that the principal and interest due on the said bond, up to that time, amounted to \$900, and that account was expressly assented to by the said T. W. and R. W. and the said J. T., and signed by the said J. T. and R. W.

That since the said settlement, several payments have been made on account, and in part satisfaction of the principal and interest due on the bond, according to the undermentioned statement.

And the said J. T., now charges that there still is justly and truly due and owing unto him the said J. T., for principal and interest, by virtue of the said bond, the sum of \$—, and for payment whereof the said J. T. hath received no other security than the said bond.

March 5th, 1831.	Amount of principal and interest brought from account, as agreed to be due on the bond,	\$900 00
1831, Nov. 27th.	Cash received.....	\$50
1833, Dec. 3d.	Do. ....	300
1835, Sept. 1st.	Do. ....	200
		<hr/>
		\$550
Interest on above payments to March 20th, 1840,		170
		<hr/>
		720 00
		<hr/>
		\$180 00
Interest on this sum from March 20th 1840, to Dec. 5th, 1843.....		50 00
		<hr/>
		\$230 00

\* And the said J. T., craves leave to add to, or alter [\*VOL. II, 496] his state of facts and charge, as he shall be advised.

S. N. solicitor, and of counsel for J. T.

J. T.

On this — day of —, 1843, before me came the above named J. T., who being duly sworn, saith, that the matters set forth in the above state of facts and charge are true, to the best of his knowledge and belief.

J. A., Master in chancery.

## No. 231.

*Charge, as to personal estate, on taking accounts before a master.*

See Vol. I., p. 508.

[*Title of cause.*]

The charge of the complainant for the personal estate and effects come to the hands of, and received by the defendant C. D., as executor of J. D. the testator, in the pleadings in this case named.

1836, Jan. 14. Cash received from Messrs. G. and C., the testator's bankers..... \$1,000 00  
Cash found in his house..... 200 00  
“ April 16. Cash received from the sale of 50 shares of stock in the Commercial Bank of Albany, 5,000 00

[*And so on, to the end of the schedule of the defendant's answer, and of his examination to interrogatories, if any.*]

And the complainant craves leave to add to, etc.

[*Jurat.*]

## No. 232.

*Discharge as to personal estate.*

See Vol. I., p. 509.

[*Title of cause.*]

The discharge of the said defendant C. D., the executor of the will of J. D. the testator, in the pleadings in this cause named, to the charge of the complainant in respect of the personal estate of the said testator, come to the hands of him, this defendant, as such executor.

\*1838, Jan. Paid R. H., the undertaker, [\*Vol. II, 497]  
for the expenses of the testator's funeral \$50 00  
“ “ Paid J. H., coachman, his wages..... 20 00  
“ “ Paid E. L., his bill for medical attendance,  
etc., during the testator's illness..... 28 00  
“ March. Paid M. J., for half year's rent of the premises  
in which the testator resided, due at Christ-  
mas last..... 75 00

[*And so on, to the end of the second schedule of the defendant's answer, and of the examination to the interrogatories, if any.*]

[*Jurat.*]

## No. 233.

*Advertisement for creditors to come in, etc.*

See Vol. I., p. 517.

[*Title of cause.*]

Pursuant to a decree of the court of chancery, in the above cause, bearing date the — day of —, 1843, the creditors of J. B., late of —, (who died in the month of —, 1840,) are required to come in and prove their debts before the subscriber, one of the masters of this court, at his office, No. 3 Merchants' Exchange, in the city of Albany, on or before the — day of — next, or in default thereof, they will be excluded from the benefit of the said decree.

Dated, etc.

D. G., Master in chancery.

## No. 234.

*Advertisement for next of kin.*

See Vol. I., p. 517.

[*Title of cause.*]

Pursuant to a decree of the court of chancery, in the above cause, bearing date the — day of —, 1843, all persons claiming to be next of kin to John Rogers, late of the city of Rochester, who died at Rochester aforesaid, on or about the — day of —, 1842, are required to come in and establish their said claims before the subscriber. [*Conclude as in last form.*]

[\*Vol. II, 498]

\*No. 235.

*Claim to surplus moneys on a mortgage sale.*

See Vol. I., p. 523.

[*Title of cause.*]

The claim of G. H., a specialty creditor of C. D., the defendant in this suit, to the surplus moneys arising from the sale of the mortgaged premises, under the decree in this cause.

The said G. H. states, that he resides at Rome, in the county of Oneida, and that he has a lien upon the said surplus moneys, by virtue of a judgment recovered against the mortgagor C. D., in the supreme court, for the sum of \$—, on the — day of —, 1842; and while he the said C. D. was the owner of the equity of redemption in the mortgaged premises, and before the commencement of this suit: which lien is next in priority after the mortgage of the complainant; and the whole amount of which judgment is still due and unpaid.

And he therefore claims the whole of the said surplus moneys arising from the sale of the mortgaged premises, which after paying the amount of the complainant's debt and costs, amount to the sum of \$—.

Dated, Dec. —, 1843.

G. H.

To J. A., Esq., Master in chancery.

*Saratoga county, ss.* G. H. the above claimant, being duly sworn, deposeseth and saith, that the facts set forth in the above claim, to which he has subscribed his name, are true; that the amount therein claimed as being due to him upon the judgment therein mentioned, is justly due, and that neither he, nor any person by his order, or to his knowledge or belief, for his use, hath received the amount thus claimed, or any part thereof, or any security or satisfaction whatsoever for the same, or any part thereof, other than the said judgment.

Sworn before me, this }  
— day of —, 1843. }

G. H.

J. A., Master in chancery.

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No. 236.

*Notice to register, of claim to surplus moneys.*

See Vol. I., p. 524.

[*Title of cause.*]

Sir:

Take notice, that I claim the whole of the surplus moneys arising from the sale of the mortgaged premises in this cause, [\*VOL. II, 499] \*which, after paying the complainant's debt and costs, amount to the sum of \$—, by virtue of a lien thereon, under a judgment recovered in the supreme court against the mortgagor C. D.,

for the sum of \$——, while he the said C. D., was the owner of the equity of redemption in the mortgaged premises, and before the commencement of this suit; which lieu is next in priority after the mortgage of the complainant; and the whole amount of which judgment is still due and unpaid.

Dated, etc.

To J. M. D., Esq.,  
Register.

Yours, etc.

J. K.

No. 237.

*Order of reference as to claims upon surplus moneys.*

See Vol. I., p. 524.

At, etc. [*as in No. 6.*]

[*Title of cause.*]

The master's report of sale having been filed in this cause, and the same having been confirmed; from which report it appears that there is a surplus in the hands of the register [*or clerk*] of this court, arising from said sale.

On reading and filing a notice of claim by J. K., to such surplus moneys, by virtue of a lien thereon, under a judgment against the mortgagor; which lien was next in priority after the mortgage of the complainant, on motion of Mr. N., of counsel for the said J. K., ordered that it be referred to one of the masters of this court, residing in the county of Saratoga, to ascertain and report the amount due to the said J. K., or to any other person, which is a lien upon such surplus moneys, and as to the priorities of the several liens thereon: and it is further ordered, that such master summon before him, upon such reference, every party who has appeared in this cause, and every person who has delivered written notice of his claim to such surplus moneys to the said master, or to the register [*or clerk*] of this court. And that he cause them to have the usual notice of all subsequent proceedings. And that the said master report thereon with all convenient speed.

[\*VOL. II, 500]

\*No. 238.

*Certificate of register, etc., as to claims to surplus moneys.*

See Vol. I., p. 524.

[*Title of cause.*]

I certify, that the following defendants have entered an appearance in this cause, to wit: C. D., by W. H. his solicitor, and E. F., by J. M., his solicitor; and that the other defendants have not caused their appearance to be entered. And further, that no notice of claim to the surplus moneys arising from the sale of the mortgaged premises in this cause, was annexed to the master's report of sale, filed in my office, and that no claim to the same was filed previous to the entry of the order of reference as to such surplus moneys: [*except one on the part of L. M., of the city of Utica, which was made in the name of S. N., his solicitor, of Utica, aforesaid.*]

Dated, etc.

J. M. D., Register.

No. 239.

*Notice of sale by a master.*

See Vol. I., p. 526.

[*Title of cause.*]

In pursuance of a decretal order of the court of chancery, made in the above cause, will be sold under the direction of the subscriber, at public auction, at the Franklin House, in the city of Utica, on Tuesday, the — day of — next, at ten o'clock, A. M., all those three lots of ground. [*Describe property.*]

Dated, Dec. —, 1843.

J. M. A., Master in chancery.

No. 240.

*Conditions of sale.*

See Vol. I., p. 527.

The property described in the above notice of sale, will be sold free from all incumbrances. The purchaser will be required to pay twenty

per cent. of the purchase money to the master, at the time of the sale [\*VOL. II, 501] \*and the residue thereof within ten days thereafter, upon the delivery of the master's deed to him. The purchaser is also to pay the sum of \$— to the auctioneer, as his fee for selling the said property; and interest on such part of the purchase money as is not paid at the time of the sale; provided the same shall not be paid on the delivery or tender of the deed.

All taxes and assessments are to be paid out of the purchase money, provided bills thereof are furnished to the master, within the time limited for the delivery of the deed.

J. M. A., Master in chancery.

I acknowledge that I have purchased the property described in the above notice of sale, on the terms and conditions above specified, for the sum of \$—, to which terms and conditions I agree to conform. And I have already paid the twenty per cent. of the purchase money required to be paid at the time of the sale.

Dated, etc.

J. W.

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No. 241.

*Master's report of sale.*

See Vol. I., p. 529.

[*Title of cause.*]

To the Chancellor of the state of New York:

In pursuance and in virtue of a decretal order of this court, made in the above cause, by the chancellor [*or vice-chancellor of the 4th circuit,*] and bearing date the — day of —, in the year one thousand eight hundred and forty-three, by which it was, among other things, ordered, adjudged and decreed, that all and singular the mortgaged premises mentioned in the bill of complaint in this cause, and hereinafter described, or so much thereof as might be sufficient to raise the amount reported due to the complainant as therein mentioned, for principal and interest, and the costs in this case, and which might be sold separately without material injury to the parties interested, be sold at public auction, by or under the direction of one of the masters of this court; that the said sale be made in the county where the said mortgaged premises, or the greater part thereof, are situated; that

the master give public notice of the time and place of such sale, according to the course and practice of this court, and that the complainant or any of the parties in this cause, might become the purchaser; that the master execute a deed to the purchaser of the mortgaged premises on the said sale; and that the said master pay to the said complainant or his solicitor, out of the proceeds of the said [\*VOL. II, 502] \*sale, his costs in this suit to be taxed, and also the amount so reported due as aforesaid, together with the legal interest thereon from the date of the said report, or so much thereof as the purchase money of the mortgaged premises would pay of the same, and that the master take receipts for the amounts so paid, and file the same with his report; and that he bring the surplus moneys arising from the said sale, if any there should be, into court, without delay, to abide the further order of the court. And whereby it was farther ordered and decreed, that if the moneys arising from the said sale should be insufficient to pay the amount so reported due to the complainant with the interest and costs as aforesaid, that the said master specify the amount of such deficiency in his report of the sale; I, the subscriber, one of the masters of this court residing in the county of Saratoga, do respectfully certify and report, that having been charged by the solicitor for the complainant with the execution of said decretal order, I advertised said premises to be sold by me at the American Hotel in the village of Saratoga Springs, on the — day of —, in the year one thousand eight hundred and forty-three; that previous to said sale I caused notice thereof to be publicly advertised for six weeks successively, as follows, viz.: by causing a printed notice thereof to be fastened up, in three public places in the county where such premises were to be sold, and by causing a copy of such notice to be printed once in each week during the six weeks immediately preceding said sale, in a public newspaper printed in said county of Saratoga, which notice contained a brief description of the said mortgaged premises.

And I do farther report, that on said — day of —, in the year one thousand eight hundred and forty-three, the day on which the said premises were so advertised to be sold as aforesaid, I attended at the time and place fixed for said sale, and exposed said premises for sale, at public auction, to the highest bidder, and the said premises were then and there fairly struck off to J. W., at the sum of \$—, he being the highest bidder therefor, and that being the highest sum bidden for the same.



And I do farther certify and report, that I have executed, acknowledged and delivered to said purchaser the usual master's deed for said premises, and have paid over or disposed of the purchase money or proceeds of said sale, as follows, viz.: I have paid to the solicitor for the complainant the sum of \$——, being the amount of his costs of this suit as taxed, and have taken a receipt therefor which is hereto annexed.

I have also retained in my hands the sum of \$——, being the amount of my fees, commissions, and disbursements on the said sale, as will appear by reference to the statement of the items thereof annexed to this [\*VOL. II, 503] my \*report, and to which I refer. And I have paid to the solicitor for the complainant the sum of \$——, and have taken a receipt therefor which is hereto annexed.

And I do further certify and report, that the premises so sold and conveyed as aforesaid, were described in said decretal order, and in the deed so executed by me as aforesaid, as follows, viz.: [*insert description.*]

All which is respectfully submitted.

J. M. A., Master in chancery.

Dated, etc.

[*Title of cause.*]

Received, Saratoga Springs, December 20, 1843, of J. M. A., the master who made the sale of the premises under and by virtue of the decree in the above entitled cause, the sum of —— dollars, being the amount of my costs in said cause as taxed, which costs are paid to me by said master, under and by virtue of the provisions of said decree.

J. E., Solicitor for the complainant.

[*Title of cause.*]

Received, Saratoga Springs, December 20, 1843, of J. M. A., the master who made the sale of the premises under and by virtue of the decree in the above entitled cause, the sum of —— dollars, which sum being part of the proceeds of the sale of said premises, is received by me under and by virtue of the provisions of said decree, the amount decreed to be paid to said complainant with interest thereon as mentioned in said decree.

J. E., Solicitor for the complainant.

*Statement of master's fees, commissions and disbursements, on the sale referred to in the preceding report, and all other costs which are not included in the taxed bill of costs in the cause.*

Drawing advertisement of the sale.....	\$0 50
One copy to print, and three copies to affix, at 20 cents .....	0 80
Drawing affidavit of affixing same, folio 1.....	0 25
Engrossing same with notice annexed, folio —, at 12½ cents...	
Drawing affidavit of printing same, folio 1.....	0 26
Engrossing same with notice annexed, folio —, at 12½ cents...	
Two oaths to ditto .....	0 25
Printers' bill for publishing notice of sale, etc.....	
Drawing conditions of sale, folio —, at 25 cents.....	
Engrossing same with notice annexed, folio —, at 12½ cts.....	
Drawing and engrossing receipt for costs, folio 1.....	0 37½
Drawing and engrossing receipt for debt, folio 1.....	0 37½
Drawing and engrossing certificate of deposit of surplus, folio 1,	0 37½
*Drawing and engrossing schedule A, annexed [*Vol. II, 504]	
to report, folio 1.....	0 20
Drawing and engrossing this statement, folio 3, at 30 cents....	0 90
Drawing and engrossing report of sale, folio —, at 30 cents ...	
Preparing deed of premises for purchaser.....	5 00
Commissioner's fees for taking acknowledgment of deed.....	0 37
Master's commissions on \$——, proceeds of sale .....	
Paid expenses of affixing notices of sale.....	

*Certificate of enrolment.*

[*Title of cause.*]

I certify that the decree in the above entitled cause is enrolled.

Register's office, December —, 1843.

J. M. D., Register.

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No. 242.

*Master's deed, on sale of mortgaged premises.*

See Vol. I., p. 531.

This indenture, made the — day of —, in the year of our Lord one thousand eight hundred and forty-three, between J. M. A., one of

the masters in chancery for the state of New York, residing in the county of Saratoga, of the first part, and J. W., of the same place, of the second part : Whereas, at a court of chancery held for the state of New York, at the capitol, in the city of Albany, on the — day of —, in the year of our Lord one thousand eight hundred and forty-three ; it was, among other things, ordered, adjudged and decreed by the said court, in a certain cause then depending in the said court, between A. B., complainant, and C. D., defendant, that the whole [or a part] of the mortgaged premises mentioned and set forth in the pleadings, in the said cause, be sold by, or under the direction of one of the masters of this court, at public auction, in the county where [that part of] the said mortgaged premises directed to be sold are situated ; the said master first giving six weeks public notice of the time and place of such sale, with a brief description of the said mortgaged premises, in one of the public newspapers printed in the county of —, and in such other manner as is required by the practice of the court. And whereas the said J. M. A., master in chancery, and party of the first part to these presents, in pursuance of the order and decree of the said court of chancery, did on the — day of — instant, sell [\*VOL. II, 505] at public auction, at —, in the county \*aforesaid, the said mortgaged premises hereinafter particularly described, having first given the previous notice of the time and place of the said sale, with a brief description of the said mortgaged premises, as required by the order and decree aforesaid ; at which sale the premises were struck off to the said party of the second part to these presents, for the sum of — dollars, that being the highest sum bidden for the same.

Now, therefore, this indenture witnesseth, that the said J. M. A., master in chancery as aforesaid, and the party of the first part to these presents, in order to carry into effect the said sale so made as aforesaid, in pursuance of the said decree, and also by virtue of the statute in such cases made and provided, and in consideration of the premises, and of the sum of — dollars, paid by the said party of the second part to these presents, to the said J. M. A., master in chancery as aforesaid, the receipt whereof he doth hereby confess and acknowledge ; hath granted, bargained, and sold, aliened, released, conveyed and confirmed, and by these presents doth grant, bargain, and sell, alien, release, convey, and confirm, unto the said party of the second part, and to his heirs and assigns forever, all that certain piece or parcel of land [insert description] together with all and singular the

rights, titles, members, privileges, hereditaments and appurtenances to the same belonging, or in anywise appertaining. To have and to hold the said premises above described, and hereby intended to be granted and conveyed, unto the said party of the second part his heirs and assigns, to his and their only proper use, benefit and behoof forever.

In witness whereof, the said party of the first part, master in chancery as aforesaid, has hereunto set his hand and seal the day and year first above written.

Sealed and delivered }  
 in presence of }  
 S. P. }

J. M. A.,  
 Master in Chancery. (L. S.)

STATE OF NEW YORK, }  
 Saratoga County, } ss.

On this — day of —, 1843, before me personally appeared J. M. A., master in chancery, known to me to be the person described in, and who executed this indenture, and acknowledged that he executed the same, for the uses and purposes therein mentioned.

A. K., Justice of the peace.

[\*VOL. II, 506]

\*No. 243.

*Order to confirm master's report of sale.*

See Vol. I., p. 529.

At, etc., [as in No. 6.]

[*Title of cause.*]

On reading and filing the report of J. M. A., one of the masters of this court, of the sale of the mortgaged premises in this cause, and on motion of Mr. E., solicitor for complainant, ordered that the same be confirmed, unless cause to the contrary thereof be shown within eight days from the entry of this order.

## No. 244.

*Exceptions to proceedings in master's office, for scandal and impertinence.*

See Vol. I., p 543.

[*Title of cause.*]

Exceptions taken by the complainant to the affidavit of the defendant C. D., produced before P. G. E., the master to whom this cause stands referred.

*First exception.*—For that the allegation in the said affidavit commencing at the word “that,” in the 2d line of the third folio, and ending at the word “ingratitude,” in the 7th line of the 5th folio thereof, is scandalous, and ought to be expunged.

*Second exception.*—For that the following words in the 5th and 6th lines of the 8th folio of the said affidavit, to wit: — are impertinent, and ought to be expunged.

In which particulars the said complainant insists, that the said affidavit is scandalous and impertinent; wherefore he excepts thereto, and prays that such scandalous and impertinent matter may be expunged.

J. E., Solicitor for complainant.

## No. 245.

*Objections to master's report.*

See. Vol. I., p. 546.

[*Title of cause.*]

Objections taken by the above complainant to the draft of the general report of J. M. A., the master, to whom this cause stands referred.

\**First.* For that the said master hath allowed, etc. [\*VOL. II, 507]

*Second.* For that the said master hath disallowed the charge, etc.

In all which particulars the said complainant objects to the draft of the said report, and submits that the same ought to be varied and altered.

J. E., Solicitor for complainant.

## No. 246.

*Order to confirm report so far as not excepted to.*

See Vol. I., p. 550.

At, etc.

[*Title of cause.*]

On filing the general report of J. M. A., the master to whom this cause was heretofore referred; and on reading and filing the exceptions taken by the complainant to certain parts thereof, on motion of J. E. solicitor for said complainant, ordered, that such report be confirmed, so far as the same is not excepted to; unless cause to the contrary thereof be shown within eight days from the entry of this order.

## No. 247.

*Exceptions to master's general report.*

See Vol. I., p. 551.

[*Title of cause.*]

Exceptions taken by E. F. one of the above defendants, to the general report of J. M. A., the master to whom this cause stands referred, by the decree made herein, on the —— day of ——, 1843, and which report bears date the —— day of ——, 1843.

*First exception.*—For that the said master, etc.*Second exception.*—For that the said master, etc.

Wherefore the said defendant doth except to the said general report, and appeals therefrom to the judgment of this court.

W. H., Sol. for def't E. F.

S. A., of counsel.

[\*Vol., II, 508]

## \*CHAPTER IV.

## FURTHER DIRECTIONS.

No. 248.

*Notice of hearing for further directions, upon master's general report.*

See Vol. I., p. 558.

[*Title of cause.*]

Sir :

Take notice, that this cause will be brought to a hearing for further directions upon the general report of J. M. A., the master to whom the said cause was heretofore referred, at the next term of this court, to be held at the capitol, in the city of Albany, on the — day of — next, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard.

Dated, etc.

To W. H., Esq., Deft's sol'r.

Yours, etc.,

J. E., Sol'r for compl't.

## BOOK III.

### INTERLOCUTORY APPLICATIONS, AND OTHER INCIDENTAL PROCEEDINGS IN A CAUSE.

#### CHAPTER I.

##### MOTIONS.

No. 249.

*Notice of motion.*

See Vol. I., p. 570.

[*Title of cause.*]

Sir :

Take notice, that I intend to move this honorable court, at the next [*special*] term thereof, to be held at the capitol in the city of Albany, on the — day of — next, at the opening of the \*court on [\*VOL. II, 509] that day, or as soon thereafter as counsel can be heard, for an order (\*) that [*specify the object of the motion ;*] and for such further, or for such other order or relief as the court may think proper to grant; which motion will be founded on affidavits, with copies of which you are herewith served, [*and on the bill and answer filed in this cause.*]

Yours, etc.

Dated, December —, 1843.

W. H., Solicitor for defendant.

To J. E., Esq.,

Solicitor for complainant.



## No. 250.

*Affidavit of service of notice of motion.*

See Vol. I., p. 573.

[Commence as in No. 2.] W. H., of the city of Troy, in said county, the defendant's solicitor, being duly sworn, deposeth and saith, that on the — day of — instant, this deponent served upon J. E., Esq., the solicitor for the complainant in this cause, copies of the affidavits and notice of motion hereto annexed, by delivering the same to him personally, [or by leaving the same in the office of the said J. E., with P. E., a clerk, who had charge of the same—the said J. E. being absent therefrom—or by putting the same into the post office at Troy, properly enclosed in an envelope, directed to the said J. E., at Utica, his place of residence, and paying the postage thereon.] And further saith not.

Sworn, etc.

W. H.

## CHAPTER II.

## PETITIONS.

No. 251.

*Petition for leave to sue in a forma pauperis.*

See Vol. I., p. 579.

IN CHANCERY.

Before the Chancellor:

*[Or before the Vice-Chancellor of the fourth circuit.]*

In the matter of the petition of A. B.
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To the Chancellor of the state of New York.

The petition of A. B., respectfully showeth, that your petitioner is desirous of filing his bill in this court against C. D., for the purpose of [\*VOL. II, 510] \*[state object of suit.] And that he hath a good and meritorious cause of action against the said C. D., as he is advised by counsel, and believes to be true. But that by reason of his poverty, he is entirely unable to commence and prosecute the intended suit unless he is permitted to do so as a poor person.

Your petitioner therefore prays, that by an order of this honorable court, he may be permitted to prosecute the said suit therein against the said C. D., as a poor person; and that J. H., may be assigned as his solicitor, and W. S. as his counsel, for that purpose.

And your petitioner, etc.

A. B.

STATE OF NEW YORK,	}	ss.
<i>Cayuga County.</i>		

On this — day of —, 1843, before me personally appeared the above named A. B., and made oath, that he has read, [*or has heard read*] the above petition subscribed by him, and that the same is true, of his own knowledge, except as to the matters which are therein stated to be, on his information or belief; and that as to those matters

he believes it to be true, (\*) and further, that he has not in his possession, or within his power or control, sufficient property or other means, over and above the wearing apparel and furniture actually necessary for himself and his family, to pay the ordinary taxable fees of the officers of this court.

P. G., Master in chancery.

*Certificate of counsel.*

I certify that at the request of the above petitioner, I have examined the grounds of the claim set forth in the above petition, and am of opinion that the said petitioner has a good and meritorious cause of action against the said C. D., cognizable in this court. Dated December —, 1843.

W. S., of counsel.

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No. 252.

*Order of reference upon No. 251.*

At, etc. [*as in No. 6.*]

[*Title as in No. 251.*]

On reading and filing the petition of A. B. duly verified, [*dated the — day of —, 1843,*] and on motion of Mr. W. S., of counsel for said petitioner, ordered that it be referred to one of the masters of this court, residing in the county of Cayuga, to examine into the circumstances of the case set forth in said petition, and to report whether, in his opinion, the said petitioner has a meritorious cause of action [\*VOL. II, 511] against \*the said C. D.; which is cognizable in this court, and has not in his possession, or within his power or control, sufficient property, or other means, over and above the wearing apparel and furniture actually necessary for himself and family, to pay the ordinary taxable fees of the officers of this court. And it is further ordered that if the said master is satisfied such petitioner is entitled to prosecute as a poor person, and has reasonable grounds for bringing a suit in this court, he do also report the names of suitable persons to be assigned as his solicitor and counsel to prosecute such suit.

## No. 253.

*Report of master, upon No. 252.*

[As in No. 209 to the (\*) then] examine into the circumstances [recite the order, No. 252, then add] I, the subscriber, one of the masters of this court, residing in the county of Cayuga, do respectfully report, that having been charged by the solicitor for the petitioner with the execution of the said order of reference, I have looked into the bill proposed to be filed by the said petitioner, and am of opinion that the said petitioner has a meritorious cause of action which is cognizable in this court, and has reasonable grounds for bringing a suit therein against the said C. D.; and further that I am satisfied, from the proof produced before me, that the said petitioner is entitled to prosecute such suit as a poor person.

And I do further report the names of J. H. and W. S. as suitable persons to be assigned, the former as solicitor and the latter as counsel, to prosecute such suit on behalf of the petitioner.

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 No. 254.
*Order to prosecute in forma pauperis.*

At, etc. [as in No. 6.]

[Title.]

On reading and filing the report of J. A., one of the masters of this court made in pursuance of an order of this court made on the — day of — instant, and on motion of Mr. E. of counsel for A. B., the petitioner named therein, ordered that the said A. B. be, and he is hereby admitted to prosecute the suit against C. D. therein referred to, in this court, as a poor person; and that J. H. be assigned to him as his solicitor, and W. S. as his counsel, for that purpose.

[\*VOL. II, 512]

## \*CHAPTER III.

## ORDERS.

No. 255.

*General form of an order.*

See Vol. I., p. 586.

At a Court of Chancery held for the State of New  
York, at —, on the — day of —, 1843.

Present—Reuben H. Walworth, Chancellor, [*or John P. Cushman  
Vice-Chancellor of the 3d circuit.*]

A. B.	}
v.	
C. D.	

On reading and filing [*recite papers on which motion was founded*] and on motion of Mr. C. E. of counsel [*or solicitor*] for complainant, [*or defendant*] no one appearing to oppose [*or, and on hearing Mr. W. C. N. of counsel for the defendant (or complainant) in opposition thereto,*] it is ordered, etc.

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No. 256.

*Order nisi.*

See Vol. I., p. 592.

See the order to confirm master's report nisi, No. 243, ante, p. 506.

## CHAPTER IV.

## AFFIDAVITS.

No. 257.

*General form of an affidavit.*

See Vol. I., p. 600.

## IN CHANCERY.

Before the Chancellor.

[*or before the vice-chancellor of the ——— circuit.*]

A. B.	}
v.	
C. D.	

STATE OF NEW YORK. }  
——— county, } ss.

E. F. of ———, in said county, \*merchant, [*or clerk* [\*VOL. II, 513] *in the office of the complainant's solicitor,*] being duly sworn, deposes and says, that at, etc.

And further this deponent saith not.

E. F.

Sworn to [*or affirmed*] before me }  
this ——— day of ———, 1843. }

A. K., Justice of the peace.

No. 258.

*Method of taking and authenticating affidavits in other states.*

See Vol. I., p. 605.

See No. 97, ante, p. 419.

## CHAPTER V.

## INJUNCTIONS.

No. 259.

*Preliminary injunction.*

See Vol. I., p. 608.

The people of the state of New York to C. D., and to his [L. s.] counsellors, attorneys, solicitors and agents, and each and every of them, greeting: Whereas it has been represented to us in our court of chancery, on the part of A. B., complainant, that he has lately exhibited his bill of complaint, in our said court of chancery, before our chancellor [*or vice-chancellor of the — circuit*] against you the said C. D., to be relieved touching the matters therein complained of; in which bill it is stated, among other things, that you are combining and confederating with others, to injure the said complainant, touching the matters set forth in the said bill, and that your actings and doings in the premises are contrary to equity and good conscience. We therefore, in consideration thereof, and of the particular matters in the said bill set forth, do strictly command you, the said C. D., and the persons before mentioned, and each and every of you, under the penalty of ten thousand dollars, to be levied upon your lands, goods and chattels, to our use, that you do absolutely desist and refrain from [*insert the matter prohibited to be done*] (\*) until you the said C. D. shall have put in your answer in this cause [*or until the master to whom this* [\*Vol. II, 514] *cause stands \*referred shall have made his report—or until the hearing of this cause by our said court of chancery*] and our said court shall have made further order thereupon.

Witness Reuben H. Walworth, chancellor of our said state, at —, the — day of —, one thousand eight hundred and forty-three.

J. M. D., Register [*or clerk*]

J. E., Solicitor.

Endorsed “By the Court.”

J. M. D., Register.

## No. 260.

*Order for temporary injunction.*

See Vol. I., p. 610.

At, etc. [*as in No. 6.*][*Title of cause.*]

On reading and filing the bill of complaint in this cause, affidavits, etc., and on motion of J. E., solicitor for complainant, ordered that the defendant show cause at the next special term of this court to be held at —, on the — day of — next, why a general injunction should not issue against him as prayed for by the said bill of complaint, and that in the mean time a temporary injunction be issued in this cause, according to the prayer of the said bill.

## No. 261.

*Order for a general injunction.*

See Vol. I., p. 625.

At, etc. [*as in No. 6.*][*Title of cause.*]

On reading and filing the bill of complaint in this cause, affidavits, and the certificate of P. G. E., the injunction master of the fourth circuit, stating that he was of opinion that an injunction should be issued pursuant to the prayer of the said bill [*on the complainant's filing a bond with two sufficient sureties, in the penal sum of \$—, and the said complainant having filed the bond required by such certificate*] and on motion of J. E., solicitor for the complainant, ordered that an injunction issue in this cause pursuant to the prayer of the said bill, and the said master's certificate. [*And that a provision be inserted in such injunction, allowing the defendant to proceed to judgment at law in the suit commenced by him against the complainant, without prejudice to the equitable rights of such complainant, notwithstanding such injunction.*]



[\*Vol. II, 515]

\*No. 263.

*General injunction.*

See Vol. I., p. 612.

[As in No. 259 to the asterisk, (\*) then as follows:] until the further order of the court. [If the defendant is permitted to proceed to judgment, agreeably to the 33d rule, add] But you are at liberty, without prejudice to the equitable rights of the complainant, to proceed to judgment only, in the suit at law which you have commenced against the said A. B., notwithstanding this our writ.

Witness, etc. [as in No. 259.]

*Methods of allowing injunction.* See Vol. I., p. 625.

No. 264.

*Perpetual injunction.*

See Vol. I., p. 613.

The people, etc. to C. D. and to his counsellors etc. greeting :  
 [L. s.] Whereas A. B. hath lately exhibited his bill of complaint in our court of chancery before the chancellor, against you the said C. D., for relief (amongst other things) touching an action at law lately commenced by you the said C. D. against him the said A. B. as executor of one E. F., for the matters in the said bill mentioned: And whereas, by a decree made upon the hearing of the said cause, on the — day of — last, it was ordered and decreed by our said court of chancery, among other things, that an injunction should issue under the seal of the said court, to restrain you the said C. D. perpetually, from proceeding any further against the said A. B. in the said action at law touching the matters in the said bill mentioned. We do therefore, in execution of the said decree, hereby firmly enjoin and command you and every of you, that from and immediately after being served with this our writ, or notice thereof, you, or any of you, do not prosecute the said A. B. any further in the said action at law touching all or any of the matters in the said bill of complaint mentioned; but that you, and every of you, do from henceforth entirely cease and desist from any further proceeding against the said A. B. in the said

action at law, from entering up judgment, or suing out or levying any execution thereupon; and this you shall in no wise omit.

Witness, etc. [*as in No. 259.*]

[\*VOL. II, 516]

\*No. 265.

*Bond on allowing injunction to stay proceeding at law, after cause at issue and before trial.*

See Vol. I., p. 626.

Know all men by these presents, that we, A. B., G. H. and L. M., all of the city of Albany, are held and firmly bound unto C. D. of the same place, in the sum of — dollars, to be paid to the said C. D., his executors, administrators or assigns. For which payment well and truly to be made, we bind ourselves jointly and severally, and our respective heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated the — day of —, 1843.

Whereas the above named A. B. has filed his bill of complaint in the court of chancery against the above named C. D., praying, among other things, for an injunction to restrain the further prosecution of (\*) a suit commenced in the supreme court by the said C. D. against the said A. B. (†) and now pending therein and at issue, but not yet brought to trial; and whereas P. G. E., injunction master of the fourth circuit, has allowed an injunction for that purpose, according to the prayer of said bill, upon the said A. B.'s giving the security required by law in such cases.

Now therefore, the condition of the above obligation is such, that if the above bounden A. B., G. H. and L. M., their executors or administrators, or any of them, shall and do well and truly pay or cause to be paid to the said C. D., his executors, administrators or assigns, (‡) all moneys which may be recovered by the said C. D., or the collection of which may be stayed by such injunction, in the said action at law, for debt or damages and for costs therein; and shall also pay such costs as may be awarded to the said C. D. by the court of chancery, on the bill filed by the said A. B., then the above obligation to be void; otherwise to be and remain in full force and virtue.

Sealed and delivered

A. B. [L. s.]

in presence of

G. H. [L. s.]

T. Y.

L. M. [L. s.]

For forms of approval and acknowledgment, and justification of sureties, see ante, p. 462.

[\*VOL. II, 517]

\*No. 266.

*Bond on allowing injunction to stay proceedings at law after judgment.*

See Vol. I., p. 627.

[*As in last form to the (†), then continue,*] in which said suit a judgment was recovered by the said C. D., against the said A. B., on the — day of — last, for the sum of \$— damages and costs. And whereas P. G. E., [*continue as in last form to the (†), then*] on demand, the said sum of \$—, recovered by the said judgment, and all such damages and costs as may be awarded to the said C. D., by the court of chancery, at the final hearing of the said cause in that court, then the above obligation, etc., [*as in last form.*]

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 No. 267.
*Bond on allowing injunction to stay proceedings after verdict in ejectment.*

See Vol. I., p. 629.

[*As in No. 265 to the (\*), then continue,*] an action of ejectment brought in the supreme court by the said C. D. against the said A. B., in which action a verdict has been obtained by the said C. D., against the said A. B. for the recovery of the lands in controversy in that suit. And whereas P. G. E. [*continue as in No. 265, to the (†), then add,*] all such damages and costs as shall be awarded against the said A. B. by the court of chancery, in case of a decision by that court against the said C. D., then the above obligation, etc., [*conclude as in No. 265.*]

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 No. 268.
*Affidavit to procure dissolution of injunction, for non-delivery of bill.*

See Vol. I., p. 637.

[*Commence as in No. 257.*] W. H., solicitor for the defendant, being duly sworn, deposeth and saith, that an injunction has been issued in this cause, and served upon the said defendant. That on the — day

of — instant, this deponent caused his appearance to be entered for the said defendant, and notice thereof to be served on the complainant's solicitor, who resides within twenty, [*or fifty*] miles of this deponent. [\*VOL. II, 518] \*Yet, that no copy of the bill filed in this cause, has been served upon this deponent, although more than six [*or ten*] days have elapsed, since the service of said notice of appearance.

Sworn, etc.

W. H.

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No. 269. ·

*Notice of motion to dissolve injunction.*

See Vol. I., p. 637.

[*As in No. 249, to the (\*), then,*] that the injunction issued in this cause be dissolved, with costs; and for such further, etc., [*as in No. 249.*]

## CHAPTER VI.

## NE EXEATS.

No. 270.

*Affidavit to obtain a ne exeat.*

See Vol. I., p. 649.

[*Title of cause.*]

STATE OF NEW YORK,	}	ss.
County of Albany,		

A. B., the above complainant, being duly sworn, deposeth and saith, that the above defendant is justly indebted to this deponent in the sum of \$—, for [*state cause of indebtedness* ;] for the recovery of which he hath lately exhibited his bill in this court, against the said defendant; to which bill the said C. D. hath not yet appeared; and that being so indebted, he the said defendant hath lately threatened and given out, that he will speedily leave this state and go into the republic of Texas. And this deponent verily believes, that if the said defendant should be suffered to leave this state, this deponent will either lose his said debt, or the same will be very much endangered, and it will be difficult, if not impossible for this deponent to recover the same.

Sworn, etc.

A. B.

[*Certificate of allowance.* See Vol. I., p. 651.]

[\*VOL. II, 519]

\*No. 271.

*Ne exeat.*

See Vol. I., p. 651.

The People of the State of New York to the Sheriff of the [L. s.] county of Albany, greeting:—Whereas it is represented to us, in our court of chancery, before our chancellor on the part of A. B., complainant, against C. D. defendant, (amongst other things)

that he the said defendant is greatly indebted to the said complainant, and designs quickly to go into parts without this state, as by oath made on that behalf appears, which tends to the great prejudice and damage of the said complainant. Therefore, in order to prevent this injustice, we hereby command you that you do, without delay, cause the said C. D., personally to come before you and give sufficient bail or security, in the sum of \$——, that the said C. D. will not go, nor attempt to go, into parts without our state, without leave of our said court. And in case the said C. D., shall refuse to give such bail or security, then you are to commit him the said C. D., to the common jail of your county, there to be kept in safe custody until he shall do it of his own accord; and when you have taken such security, you are forthwith to make and return a certificate thereof to us, in our said court of chancery, distinctly and plainly under your hand, together with this writ.

Witness, Reuben H. Walworth, Chancellor of our said state, at —— the —— day of ——, in the year of our Lord, one thousand eight hundred and forty-three.

J. M. D., Register.

J. E., Solicitor.

*Endorsed.*

By the special order of the court. Hold the defendant to bail in the sum of \$——.

J. M. D., Register.

*Returns to ne exeat.*

*Where defendant has been arrested, and has given security.]* I certify and return that I have caused the within named C. D., personally to come before me, and he hath found bail in the sum of \$——, according to the command of the within writ.

J. S., Sheriff.

*Where defendant is not to be found.]* I certify that the within named C. D. is not to be found in my bailiwick.

(Sheriff's name.)

*Where defendant has been arrested, and committed for want of bail.]* I certify that I have caused the within named C. D., personally to come [\*VOL. II, 520] \*before me; and he having refused to give the bail or security within mentioned, I have his body in the common jail of the county of Albany under my custody.

(Sheriff's name.)

## No. 272.

*Bond to sheriff, upon a ne exeat.*

See Vol. I., p. 564.

Know all men by these presents, that we, C. D., of the city of Albany, merchant, and E. F. and G. H., of the same place, gentlemen, are held and firmly bound unto J. S., sheriff of the county of Albany, in the penal sum of ——— dollars, to be paid to the said J. S., sheriff as aforesaid, or his assigns. For which payment well and truly to be made, we bind ourselves jointly and severally, and our, and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals and dated the ——— day of ———, 1843.

Whereas the above named C. D., has been arrested upon a writ of ne exeat, issuing out of, and under the seal of the court of chancery of the state of New York, in a certain cause therein pending, wherein A. B. is complainant, and the said C. D. is defendant, and is now in custody of the said J. S., sheriff as aforesaid, by virtue thereof.

Now, the condition of this obligation is such, that if the said C. D. shall (\*) not depart from or leave this state without the permission of the court of chancery, then this obligation to be void; otherwise to be and remain in full force and virtue.

## No. 273.

*Bond to obtain a discharge of ne exeat.*

See Vol. I., p. 655.

[As in last form, to the (\*) except that it is made payable to the complainant, or his representatives; then add] cause his appearance to be entered in the said suit, and put in his answer to the said complainant's bill, and shall at all times render himself amenable to the process of the said court of chancery pending the said suit, and to such as may be issued to compel a performance of the final decree therein, then this obligation, etc. [as in last form.]

[\*Vol. II, 521]

\*No. 274.

*Affidavit to procure discharge of ne exeat, for neglect to serve bill.*

See Vol. I., p. 655.

In same form, *mutatis mutandis*, as No. 268.

## CHAPTER VII.

## RECEIVERS.

## No. 275.

*Notice of motion for order of reference to appoint a receiver.*

See Vol. I., pp. 668, 669.

[*Title of cause.*]

Sir:

Take notice [*as in No. 249 to the (\*)*] that it be referred to one of the masters of this court residing in the county of — to appoint a receiver of the rents and profits of the estate [*or of the estate, property and effects*] of the defendant C. D. referred to in the pleadings in this cause, with the usual powers and upon the usual directions; and for such other, etc. [*as in No. 249;*] which motion will be founded upon [*the pleadings in this cause and upon*] affidavits with copies of which you are herewith served.

Dated, etc.

J. E., Solicitor for complainant.

To W. H., Esq.,

Solicitor for defendant.

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No. 276.

*Affidavit of service of No. 275.*

STATE OF NEW YORK, }  
 County of Saratoga, } ss.

E. F., of the town of Waterford in said county, being duly sworn, saith, that he did on the 23d day of November, 1843, personally serve on C. D., the defendant above named, a notice of which the above is a copy.

E. F.

Sworn to this 10th day of }  
 Dec., 1843, before me, }

A. K., Justice of Peace.



[\*VOL. II, 522]

\*No. 277.

*Order of reference to a master to appoint a receiver.*

See Vol. I., p. 670.

At, etc. [as in No. 255.]

[Title of cause.]

On reading and filing affidavits and the pleadings in this cause, and on motion of J. E., solicitor for complainant, and on hearing W. H., solicitor for the defendant, in opposition thereto, ordered that it be referred to one of the masters of this court residing in the county of — to appoint a receiver of the rents and profits of the estate [or of the estate, property and effects] of the defendant C. D. mentioned in the pleadings in this cause, with the usual powers, and upon the usual directions; and that the said master take from such receiver the necessary and usual security for the performance of his trust, and file the same in the proper office; and that upon the filing of the report of the master, and of such security, such receiver be vested with all his rights and powers as receiver according to the rules and practice of this court.(a)

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 No. 278.
*Assignment to receiver in creditor's suit.*

See Vol. I., p. 671.

This indenture, made the — day of —, in the year one thousand eight hundred and forty, between C. D. of the first part, and T. M. of the town of Waterford, in the county of Saratoga, and state of New York, a receiver appointed by the court of chancery of the state of New York, of the second part. Whereas, in and by an order of the court of chancery of the state of New York made by the [vice] chancellor [of the fourth circuit] in a certain cause pending in said court, wherein A. B. is complainant, and C. D. is defendant, which order bears date the — day of —, in the year one thousand eight hundred and forty, it was ordered, that it be referred to one of the masters of this court residing in the county of Saratoga to appoint some suitable

(a) The order of reference to appoint a receiver in a creditor's suit will be given hereafter. See No. 356.

[\*VOL. II, 523] \*and proper person receiver of all the debts, property, equitable interests and things in action, of the said party of the first part, at the time of filing the bill of complaint in this cause, to wit, on the — day of —, one thousand eight hundred and forty, and to take from such receiver the requisite security for the faithful performance of his duties. And it was further ordered, that the said party of the first part assign, transfer and deliver over to such receiver on oath, under the direction of the said master, all the property real and personal, and all contracts for the purchase of land, and all other equitable interests, things in action and other effects which belonged to or were held in trust for said party of the first part, or in which he had any beneficial interest at the time of exhibiting the said bill of complaint as aforesaid, except such articles of personal property as are exempted by law from sale on execution; and that the said party of the first part deliver over, in like manner, all books, vouchers and other evidences relating thereto. And it was further ordered, that the said receiver have full power and authority to enquire after, receive and take possession of, all such property, debts, equitable interests, things in action and other effects, and for that purpose to examine the said party of the first part and such other persons as he may deem proper, on oath, before the said master, from time to time, as he may deem necessary; and that the said receiver have full power and authority to demand, sue for and collect, in the name of the said party of the first part or otherwise, all debts and demands belonging to the said party of the first part as aforesaid, and to compromise and settle such as are unsafe, or of a doubtful character, and to dispose of the personal property so to be assigned and delivered over to him, as he may deem most advisable. And it was further ordered, that the said party of the first part and his tenants, attorn to the said receiver and pay to him the rents and profits of any real estate of which the said party of the first part is entitled to receive the rents and profits, and that the said receiver have power to make leases of such real estate, from time to time, not exceeding one year, as he may deem advisable.

And whereas, the said party of the second part has been duly appointed said receiver, and has given and filed the requisite security, pursuant to the rules and practice of the said court and the provisions of the said order. Now this indenture witnesseth, that the said party of the first part, in obedience to the said order, and in consideration of the premises aforesaid, and of one dollar to him in hand paid by

[\*VOL. II, 524] the said \*party of the second part, at or before the en sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, conveyed, assigned, transferred and delivered over to the said party of the second part, under the direction of the said master, testified by his approval endorsed hereon, all and every the estate real and personal, chattels real, moneys, outstanding debts, things in action, equitable interests, property and effects whatsoever and wheresoever, of or belonging, or due to, or held in trust for, the said party of the first part, or in which he had any right, title or interest at the time of filing the bill of complaint in the suit in chancery above referred to; to wit, on the — day of —, in the year one thousand eight hundred and forty, (except such articles of personal property as are exempt by law from sale on execution, and except also where such trust has been created by, or the fund held in trust has proceeded from, some person other than the said party of the first part,) and more especially this instrument is intended to grant and convey all the property, equitable interest, things in action and effects described or enumerated in the schedule hereto annexed; and also all deeds, writings leases, muniments of title, books of account, papers, vouchers and other evidences relating or appertaining to the property, equitable interests, things in action and effects hereby granted and conveyed, or intended so to be. To have and to hold the same unto him the said party of the second part, as such receiver as aforesaid, and to his successors and assigns; subject to the present and future order, direction and control of the said court of chancery. And for the better and more effectually enabling the said party of the second part, his successors and assigns, to recover and receive all or any part of the estate, property, book debts, things in action and effects hereby granted, conveyed, assigned and transferred, he the said party of the first part, hath made and appointed, and by these presents doth make and appoint, the said party of the second part, his successors and assigns, the attorney and attorneys of him the said party of the first part, in his name or otherwise, to commence, continue, discontinue and again bring, perfect and carry out actions and suits against any corporate company, association, firm, person or persons, for or on account of all or any part of the said estate, property, equitable interests, things in action or effects.

In witness whereof, the said party of the first part hath hereunto set his hand and seal the day and year first above written.

Sealed and delivered }  
in the presence of }

C. D. [L. s.]

[\*Vol. II, 525]

\*Endorsed.

I approve of the within assignment, and direct that the party of the first part therein named, execute the same, and deliver it to the party of the second part.

Dated —, 1843.

P. G., Master in chancery.

No. 279.

*Proposal of names for receiver and his sureties.*

See Vol. I., p. 672.

[*Title of cause.*]

The complainant proposes to the master to whom this cause stands referred, the name of W. M. of, etc. as a suitable person to be appointed receiver in this cause by him.

And the said W. M. proposes T. N. of, etc. and G. H. of, etc. as his sureties as such receiver.

Dated, etc.

J. E., Sol. for complainant.

No. 280.

*Bond of receiver.*

See Vol. I., p. 673.

Know all men by these presents, that we, W. M., T. N. and G. H., of the town of Waterford, in the county of Saratoga, are held and firmly bound unto the register of the court of chancery of the state of New York, [or, *the clerk in chancery for the — circuit*] in the sum of — dollars, lawful money of the United States of America; to be paid to the said register, [or, *the clerk in chancery for the — circuit*] his successor in office or assigns. For which payment well and truly to be made, we and each of us bind ourselves respectively, jointly and severally, and our respective heirs, executors and administrators, firmly by these presents. Sealed with our seals. Dated the — day of —, 1843.

Whereas, by an order of the court of chancery of the state of New-York, made by the [*vice-chancellor of the 4th circuit,*] in a cause pending in said court, in which A. B. is complainant, and C. D. is defendant, it was among other things ordered, that it be referred to one of the masters of said court residing in the county of Saratoga, to appoint some suitable and proper person, receiver of all the debts, property, equitable interests and things in action of the said defendant C. D., [\*Vol. II, 526] and to take \*from such receiver the requisite security for the faithful performance of his duties. And whereas said W. M. hath been appointed by such master, such receiver. Now, therefore, the condition of the above obligation is such, that if the said W. M. shall and do, as required by the rules and practice of this court, duly file an inventory, and annually or oftener if thereunto required, duly account for what he shall so receive or have in charge as receiver in the said cause; and pay and apply what he shall so receive or have in charge, as he may from time to time be directed by said court, and obey such orders as said court may from time to time make in relation to said trust, and in all respects faithfully discharge the duties of the said trust, then the above obligation to be void, but otherwise to be and remain in full force.

Sealed and delivered  
in the presence of  
O. P.

W. N. [L. s.]  
T. N. [L. s.]  
G. H. [L. s.]

I certify, that on the — day of —, 1843, personally appeared before me the subscriber, W. M., T. N. and G. H., the obligors in the preceding bond, to me known to be the persons described in and who executed the same, and acknowledged severally that they so executed the same.

P. G., Master in chancery.

STATE OF NEW YORK, }  
Saratoga county. } ss.

T. N. and G. H. of Waterford, in said county, being duly sworn, say, and each for himself says, that he is worth — dollars, over and above all debts that he owes, and all liabilities and responsibilities he has assumed or incurred.

Sworn to before me, this }  
— day of —, 184—. } T. N.  
G. H.

P. G., Master in chancery.

No. 281.

*Master's report of appointment of receiver.*

See Vol. I., p. 673.

[*Title of cause.*]

To the Chancellor of the State of New York :

In pursuance and in virtue of an order of this court made in the above entitled cause, dated the — day of —, 1843, whereby among other things it was referred to one of the masters of this court, residing in the county of Saratoga, to appoint a receiver in this cause of all the [\*VOL. II, 527] \*debts, property, equitable interests and things in action of the defendant C. D., and to take from such receiver the requisite security.

I, the subscriber, one of the masters of this court, residing in the county of Saratoga, do respectfully report, that having been charged by the complainant's solicitor with the execution of said order of reference, I have been attended by the counsel of the complainant, and by said defendant C. D. That I thereupon proceeded on the matters so referred: that W. M. of the town of —, in the county of Saratoga, was proposed by the counsel for said complainant to be the receiver in this cause, to which said defendant making no objection, and I deeming him a proper person therefor, have appointed him such receiver, and have taken from him the requisite security which is hereto annexed, being the bond of said receiver with T. N. and G. H. as his sureties in the penal sum of — dollars.

All which is respectfully submitted.

Dated Dec. —, 1843.

P. G., Master in Chancery.

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## CHAPTER VIII.

## ABATEMENT AND REVIVOR.

No. 282.

*Petition by complainant to revive on the death of defendant.*

See Vol. I., p. 681.

[*Title of cause.*]

To the Chancellor of the State of New York.

The petition of the above complainant respectfully showeth, that on the — day of —, 1842, he exhibited his bill of complaint in this court against C. D. for the foreclosure of a mortgage executed by the said C. D., and praying for the sale of the mortgaged premises, and for the payment of the mortgage debt. That the said C. D. caused his appearance to be entered [*and his answer to be filed,*] in such suit; and that before any [*exceptions to such answer were filed, or any,*] further proceedings were had in said suit, and on or about the — day of —, 1842, the said C. D. departed this life; having first duly made and published his last will and testament by which he appointed J. K. his executor, who has since duly proven said will and taken upon himself the burthen of the execution thereof [*or intestate, not leaving any will; and that J. K. has been duly appointed administrator of, etc. of the said C. D.*] And that as such executor [*or administrator*] the said [\*Vol. II, 528] J. K. hath possessed himself \*of the personal estate of the said C. D. sufficient to pay and satisfy all the just debts of the said C. D., including the demand of your petitioner.

And your petitioner further showeth, that the said suit having become abated by the death of the said C. D., your petitioner is advised that it is necessary the same should be revived, before any further proceedings can be had therein.

Your petitioner therefore prays, that such suit may, by an order of this court, be directed to stand revived against the said J. K., as the personal representative of the said C. D., and that it may be in the same plight and condition as it was in at the time of the death of the

said C. D. [*If an answer from the personal representative is sought for, insert a prayer that he may answer the matters as to which a further answer is required; repeating, and specifying such matters particularly.*]

And for such further, or other order in the premises as shall be just. [*Jurat as in No. 252, to the (\*).*]

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No. 283.

*Order on petition to revive.*

See Vol. I., p. 681.

At, etc. [*as in No. 255.*]

[*Title of cause.*]

On reading and filing the petition of the above complainant, duly verified, praying that this suit may be directed to stand revived against J. K., as the executor [*or administrator*] of the defendant C. D., and on motion of J. E., solicitor for said complainant, ordered that this suit do stand revived against the said J. K., executor [*or administrator*] as aforesaid; and that the said suit and the proceedings therein, be in the same plight and condition they were in at the death of the said C. D. And it is further ordered, that the said J. K. do appear in this cause, and answer or disclaim within eighty days after service of a copy of this order upon him, [*if no answer had been put in by deceased party, add,*] or that in default thereof, his appearance be entered by the court (\*), and the bill in this cause be taken as confessed by the said J. K., or that an answer thereto be compelled by attachment. [*If deceased party has answered, and a further answer is required, say*] And it is further ordered, that a copy of the petition above mentioned be annexed to a copy of this order, and served upon the said J. K., and that if he does not appear and put in a further [\*VOL. II, 529] answer to the matters to which a \*further answer is required by the said petition, or disclaim, within eighty days after service of a copy of such petition and of this order, the said petition may be taken as confessed, as to the matters to which such further answer is required, [*or that an attachment do issue against him, to compel such further answer.*]

N. B. If an answer has been put in by the original defendant, and



no further answer is required, proceed as in above to the (\*), then say, and that the answer of the said C. D., filed in his lifetime, be deemed the answer of the said J. K. as his representative.

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No. 284.

*Order on petition to revive, where deceased party has not answered.*

See Vol. I., p. 681.

At, etc. [*as in No. 255.*]

[*Title of cause.*]

An order having been entered in this cause on the — day of — last, directing this suit to stand revived against J. K., as executor [*or administrator*] of the defendant C. D., who has died, and that this suit and the proceedings therein, should be in the same plight and condition they were in at the death of the said C. D., and ordering (\*) the said J. K. to appear in this cause, and answer or disclaim within eighty days after service of a copy of such order upon him, or that in default thereof, his appearance be entered by the court, and the bill be taken as confessed by him, or that an answer thereto be compelled by attachment; on reading and filing due proof of the service of a copy of the said order on the said J. K., more than eighty days since; and that he has not appeared and answered or disclaimed in this suit; on motion of J. E. solicitor for complainant, ordered that the appearance of the said J. K. be entered in this cause pursuant to the statute; and that (†) the bill of complaint in this cause be taken as confessed by the said J. K., executor [*or administrator*] as aforesaid, [*or that an attachment issue in this cause against the said J. K., to compel an answer by him to the bill of complaint filed therein.*]

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[\*VOL. II, 530]

\*No. 285.

*Order on petition to revive, where deceased party has answered, and further answer is required.*

See Vol. I., p. 681.

[*As in No. 284 to the (\*), then*] that a copy of the petition of the complainant referred to in said order, be annexed to a copy of such

order, and served upon the said J. K. ; and that if he did not appear and put in a further answer to the matters to which a further answer is required by the said petition, or disclaim, within eighty days after service of copies of such petition and order, the said petition should be taken as confessed, as to the matters to which such further answer is required, [*or that an attachment might issue against him to compel such further answer;*] on reading and filing due proof of the service of copies of said petition and order on the said J. K., more than eighty days since, and that he hath not appeared and put in a further answer to the matters to which a further answer is required by the said petition, nor disclaimed; on motion of J. E., solicitor for complainant, ordered that the said petition be taken as confessed by the said J. K., executor [*or administrator*] as aforesaid, as to the matters as to which a further answer was required in the petition aforesaid, [*or that an attachment issue in this cause against the said J. K., to compel a further answer to the matters as to which a further answer was required in the petition aforesaid.*]

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No. 286.

*Order on petition to revive where deceased party has answered, and no further answer is required.*

[*As in No. 284 to the* (\*), *then add,*] that the said J. K. should appear in this cause, and answer or disclaim within eighty days after service of a copy of such order upon him, or that in default thereof his appearance be entered by the court, and that the answer of the said C. D., filed in his lifetime, should be deemed the answer of the said J. K., as his representative; on reading and filing due proof of the service of a copy of the said order on the said J. K., more than eighty days since, and that he hath not appeared and answered or disclaimed in this suit; and on motion of J. E., solicitor for complainant, ordered, that the appearance of the said J. K. be entered in this cause, pursuant to the statute; and \*that the answer of the said C. D. to the bill of complaint in this cause, filed in his lifetime, be deemed the answer of the said J. K., as his representative.

## No. 287.

*Petition to revive on death of complainant—cause of action not surviving.*

See Vol. I., p. 682.

[*Title of cause.*]

To the Chancellor of the state of New York.

The petition of W. B., of the city of Troy, executor of A. B., late of the same place, deceased, respectfully showeth, that on the — day of —, in the year 1842, the said A. B. exhibited his bill in this court against C. D., for the purpose of [*state object of suit,*] and praying in substance, [*state substance of prayer.*] That the said defendant caused his appearance to be entered in the said suit; and that on or about the — day of —, 1842, and before any further proceedings were had in the said suit, the said C. D. died. That previous to his death, he made and published his last will and testament, in due form of law, by which, among other things, he appointed your petitioner the sole executor thereof. That since the death of the said A. B., your petitioner has proved the said last will and testament before the proper surrogate, taken out letters testamentary thereon, and has taken upon himself the burthen of the execution thereof. That the said cause having abated by the death of the said A. B., your petitioner is desirous of reviving the same, as his executor.

Your petitioner therefore prays, that he may be made complainant in the said suit, and be permitted to revive and continue the same in his own name, as executor as aforesaid. And that he may be permitted to amend the bill of complaint filed therein, as he shall be advised.

And your petitioner, etc.

## No. 288.

*Order to revive on No. 287.*

At, etc. [*as in No. 255.*]

[*Title.*]

On reading and filing the petition of W. B., executor of A. B., the complainant in this cause, duly verified, stating the abatement of this suit by the death of the said A. B., and on reading and filing due

[\*Vol. II, 532] proof \*of service of notice of this motion on all the parties entitled to notice thereof; on motion in open court of J. E., solicitor for said petitioner, ordered that the said W. B. be, and he is hereby made complainant in this suit, and that the said suit be revived and continued in his own name as executor of the said A. B. And further, that he be allowed to amend the bill of complaint filed in this cause as he shall be advised.

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No. 289.

*Petition by surviving complainant to revive against representatives of a deceased complainant.*

See Vol. I., p. 683.

[*Title.*]

To the Chancellor of the state of New York.

The petition of E. F., one of the complainants in this cause, respectfully showeth, that on or about the — day of —, 1842, your petitioner and A. B., the other complainant, exhibited their bill in this cause against the defendant therein, for the purpose of [*state object of suit,*] and praying in substance [*state substance of prayer.*] That the said defendant caused his appearance to be entered in the said cause, and that on or about the — day of —, 1842, and before any further proceedings were had therein, the said A. B. died; having first made and published his last will and testament, by which among other things, he appointed G. B. and F. B., the executors thereof. And that the said executors have proved the said will before the proper surrogate, taken out letters testamentary thereon, and have taken upon themselves the burthen of the execution thereof.

And your petitioner further showeth, that although more than eighty days have elapsed since the death of the said A. B., the said executors have not yet caused themselves to be made complainants in this cause, in the place of the said A. B.

Your petitioner therefore prays that the said G. B. and F. B., executors as aforesaid, may by an order of this court, be made defendants in this suit and that such suit, and the proceedings therein, may stand revived, and be continued against them as such defendants. And that a copy of this petition and of the order to be entered hereon may be

served on the said G. B. and F. B., and that they be required to appear and answer this petition, or disclaim, within eighty days after such service, or that in default thereof the said order may be made absolute against them, and that a formal appearance may be entered for them in this suit.

And your petitioner, etc.

[\*VOL. II, 533]

\*No. 290.

*Order to revive upon No. 289.*

At, etc. [*as in No. 255.*]

[*Title of cause.*]

On reading and filing the petition of E. F., one of the complainants in this cause, duly verified, stating the abatement of this suit by the death of A. B., the other complainant therein, and the appointment of G. B. and F. B. as his executors, and that although more than eighty days have elapsed since the death of the said A. B., his said executors have not yet caused themselves to be made complainants in this cause, in the place of the said A. B.; and on reading and filing due proof of service of notice of this application, on all the parties entitled thereto; on motion of J. F., solicitor for the said E. F., ordered that the said G. B. and F. B., executors as aforesaid, be and they are hereby made defendants in this suit, and that such suit and the proceedings therein do stand revived and be continued against them as such defendants. And it is further ordered, that a copy of the said petition and of this order be served upon the said G. B. and F. B., and that they appear and answer such petition, or disclaim, within eighty days after such service, or that in default thereof this order be made absolute against them, and a formal appearance be entered for them in this suit.

(*See Wilkinson v. Parish, 3 Paige, 665.*)

## No. 291.

*Order upon defendant's default under No. 290.*

See Vol. I., p. 683.

At, etc. [*as in No. 255.*][*Title of cause.*]

On reading and filing due proof of the service of the order of this court made on the — day of — last, and of the petition therein mentioned, upon G. B. and F. B., executors of A. B., one of the original complainants in this cause, more than eighty days since, and that the said G. B. and F. B. have not yet appeared and answered the said petition, or disclaimed, as required by such order, and on reading and filing due proof of service of notice of this motion; on motion of J. E., solicitor for E. F., the surviving complainant, ordered that the order [\*VOL. II, 534] \*above mentioned be and the same is hereby made absolute against the said G. B. and F. B., executors as aforesaid, and that their appearance in this suit be, and the same is hereby entered.

## No. 292.

*Petition by defendant, to revive, against representatives of deceased complainant.*

See Vol. I., p. 684.

[*Title of cause.*]

To the Chancellor of the State of New York:

The petition of C. D., the above defendant, respectfully sheweth, that A. B. the sole complainant [*or one of the complainants*] in this cause, died, as your petitioner is informed and believes, on or about the — day of — last, having first, as your petitioner is also informed and believes, made and published his last will and testament in due form of law by which among other things, he appointed G. B. and F. B. his executors; and that they have proved the said will, and taken upon themselves the burthen of the execution thereof.

And your petitioner further sheweth that the said G. B. and F. B. have hitherto neglected and refused to make themselves complainants in this suit, in the place of the said A. B. [*or that L. M. the surviving*

*complainant in this cause, hath, since the death of the said A. B. hitherto neglected and refused to proceed against his above mentioned representatives as defendants.]*

Your petitioner therefore prays that the said G. B. and F. B. executors as aforesaid, may, by an order of this court, be directed to show cause, at a certain day to be named therein, why this suit should not stand revived in their names, or the bill of complaint be dismissed, so far as the interests of the said executors are concerned.

And your petitioner, etc.

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No. 293.

*Order to show cause, upon No. 292.*

At, etc. [*as in No. 255.*]

[*Title of cause.*]

On reading and filing petition, of C. D. the defendant in this suit, duly verified, and on motion of W. H., solicitor for said defendant, ordered that G. B. and F. B. executors of A. B. deceased, the complain- [\*VOL. II, 535] ant [*or \*one of the complainants*] in this cause show cause before the chancellor at the next special term of this court, to be held at —, on the — day of —, why this suit should not stand revived in their names, or the bill be dismissed, so far as the interests of such executors are concerned. And it is further ordered that a copy of the petition above mentioned, and of this order, be served upon the said executors, at least eight days previous to the time above mentioned.

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No. 294.

*Order upon neglect to show cause under No. 293.*

At, etc. [*as in No. 255.*]

[*Title of cause.*]

An order having been made in this cause on the — day of — last, requiring G. B. and F. B., executors of A. B. deceased, the complainant [*or one of the complainants*] in this suit, to show cause before

the chancellor, this day, why this suit should not stand revived in their names, or the bill be dismissed, so far as the interests of such executors are concerned; on reading and filing due proof of the reasonable service of a copy of such order upon the said G. B. and F. B., and the said G. B. and F. B. not appearing to show cause to the contrary; on motion of J. H., solicitor for the defendant, ordered that this suit be and the same is hereby revived in the names of the said G. B. and F. B. as such executors [*or that the bill in this cause be dismissed, so far as the interests of such executors are concerned, with costs.*]





## OF THE DIFFERENT KINDS OF BILLS.

## CHAPTER I.

## BILL OF REVIVOR.

No. 295.

*Bill of revivor on the marriage of a female complainant.*

See ante, pp. 34, 40, 46.

## IN CHANCERY.

Before the Chancellor.

*[or before the vice-chancellor of the — circuit.]*

To the Chancellor of the State of New York.

Complaining show unto your honor your orator and oratrix A. B. of the city of Utica, and E. B., his wife, formerly E. S. That your oratrix, on or about the — day of —, in the year one thousand eight hundred and forty —, exhibited her bill of complaint in this honorable court against C. D., the defendant therein and hereinafter named, thereby praying [*state the prayer of the bill verbatim.*] And the said C. D., being served with process of subpoena for that purpose, appeared and put in his answer to the said bill; as by the said bill and answer now remaining filed as of record in this honorable court, reference being thereunto had, will more fully appear. And your orator and oratrix further show unto your honor, that before any further proceedings were had in the said cause, and on or about the — day of —, your orator and oratrix duly intermarried, and the said suit thereby became abated. But your orator and oratrix are, as

they are advised, entitled to have the same revived against the said C. D., and restored to the same condition as it was in previously to, and at the time of, the intermarriage of your orator and oratrix.

To the end, therefore, that the said suit and proceedings may be revived against the said C. D., and be in the same condition as the same were in at the time of the abatement thereof by the marriage of your orator and oratrix, or that the said C. D. may show good cause to the contrary, may it please your honor to grant unto your orator and oratrix the people's writ of subpœna to revive, issuing out of, and [\*VOL. II, 537] under the \*seal of this honorable court, to be directed to the said C. D., thereby commanding him, at a certain day and under a certain penalty to be therein inserted, personally to be and appear before your honor in this honorable court, then and there to answer and shew cause, if he can, why the said suit and proceedings therein had, should not stand and be revived against him, and be in the same plight and condition as the same were in at the time of the abatement thereof; and further, to stand to and abide such order and decree in the premises as to your honor shall seem meet.

And your orator and oratrix will ever pray, etc.

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No. 297.

*Bill of revivor against the executors of a deceased defendant; where an answer is required.*

See ante, p. 47.

[Commence as in last form.] That on or about the — day of — your orator exhibited his bill of complaint in this honorable court against C. D. of —, etc., and E. F. of —, etc., and R., his wife, thereby praying, etc. [*here state the prayer.*] And your orator further sheweth unto your honor, that the said defendants having been served with process of subpœna for that purpose, duly appeared and put in their answers to the said bill, and divers other proceedings were had in the said cause, and the same came on to be heard on or about the — day of —, before the chancellor, [*or vice-chancellor of the — circuit;*] whereupon a decretal order was made in the said cause, and G. H., Esquire, one of the masters of this court, to whom this cause was referred thereby, afterwards made a report in the said cause,

which said report was duly confirmed; as by the said bill, answer, decree, report, and the other proceedings in the said cause, now remaining duly filed as of record, in this honorable court, reference being thereunto had, will more fully appear.

And your orator further sheweth unto your honor that the said C. D. departed this life on or about the — day of —, and before any further proceedings were had in the said cause, having, in his lifetime, duly made and published his last will and testament in writing, bearing date on or about the — day of —, and thereby appointed N. O. and P. R., the defendants hereinafter named, executors thereof, who have, since the death of the said testator, duly proved his will before the proper surrogate, and taken upon themselves the burthen of the execution thereof; and under and by virtue of such probate [\*VOL. II, 538] have possessed themselves of \*the personal estate of the said testator, sufficient for the payment of his funeral and testamentary expenses and debts, and also to answer every demand of your orator thereon, touching the matters in question in the said cause. And the said suit having abated by the death of the said C. D., your orator is advised that he is entitled to have the same, and the several proceedings therein, revived against the said N. O. and P. R., as executors of the said C. D., and restored to the condition in which they were at the time of the death of the said C. D.

To the end, therefore, that the said N. O. and P. R. may, upon their several and respective oaths, full, true, perfect and distinct answer make to the several matters aforesaid, and particularly that they, in like manner, answer and set forth whether your orator did not, at or about the time aforesaid, and when, exhibit his original bill of complaint in this honorable court, against such persons and for such purposes as therein and herein before mentioned? And whether such decree and report and other proceedings as aforesaid have not been made in the said cause? And whether the said C. D. did not depart this life at or about the time aforesaid, or when else? And whether he did not, before his death, duly make and publish his last will and testament in writing of such date as aforesaid, and thereby appoint the said N. O. and P. R., respectively, executors thereof? And whether they have not proved the said will before the proper surrogate, and taken upon themselves the burthen of the execution thereof. And whether they, or one, and which of them, have or has not possessed sufficient of the personal estate and effects of the said testator, to satisfy his funeral and testamentary expenses and debts, and also

every demand of your orator thereon, touching the matters in question in this cause, or how otherwise? And that the said N. O. and P. R., respectively, may either admit assets of the said C. D. come to their hands, sufficient for the purposes aforesaid, or that they may set forth an account of his personal estate possessed by or on behalf of them, or either of them, and of the application and administration thereof? And that the suit and the proceedings therein, may stand revived against the said defendants N. O. and P. R. as such executors as aforesaid, and be restored to the same plight and condition as they were in at the time of the said C. D.'s death, or that the said N. O. and P. R., respectively, may show good cause to the contrary; and in case the said executors shall not admit, to the satisfaction of this honorable court, assets sufficient to pay and satisfy your orator's said demand; then that an account may be taken by and under the decree of this honorable court, of the said testator's estate and effects received by or [\*VOL. II, 539] for the use \*of them the said N. O. and P. R. as such executors as aforesaid, or either of them, and of the application and administration thereof.

May it please your honor, to grant unto your orator the people's writ of subpoena to revive and answer, issuing out of and under the seal of this honorable court, to be directed to the said N. O. and P. R. as such executors as aforesaid, thereby commanding them at a certain day and under a certain penalty to be therein limited, personally to be and appear before your honor, in this honorable court, then and there to answer the premises and to show cause, if they can, why the said suit and the proceedings therein had, should not stand and be revived against them, and be in the same plight and condition as the same were in at the time of the abatement thereof; and further to stand to, and to abide, such order and decree in the premises as to your honor shall seem meet.

And your orator shall ever pray, etc.

*Prayer for an answer to original bill as well as to bill of revivor.(a)*

To the end therefore, that the said defendants may, if they can, show cause why your orator should not have the relief hereby and by his said original bill prayed, and may upon their several and respective corporal oaths according to the best and utmost of their several

(a) This is necessary where the bill is filed against the representatives of a defendant to the original bill, who had died after appearance, and before answer. In such a case an answer to the original bill being necessary, and an answer to the bill of revivor being required, with respect to the assets.

and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the several matters set forth in the said original bill, as well as to the matters set forth in the present bill; and particularly that they, in like manner answer and set forth whether, etc.

And that the said defendants may, if they can, [*prayer for revivor and for admission of assets, or for an account.*]

May it please your honor to grant, etc. [*as in last form*] then and there to answer your orator's said original bill, and also the premises, and to shew cause [*conclude as above.*]

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[\*VOL. II, 540]

\*No. 298.

*Order to plead or demur to bill of revivor.*

See ante, p. 49.

At, etc. [*as in No. 255.*]

[*Title of cause.*]

On filing bill of revivor against N. O. and P. R., executors of C. D., and on motion of J. E., solicitor for complainant, ordered that the said defendants do, within ten days after service of a copy of said bill, plead or demur to the same, or that in default thereof this suit be revived and proceed in the names of the said N. O. and P. R., executors as aforesaid, as defendants.

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No. 299.

*Affidavit to obtain an order to revive.*

See ante, p. 49.

[*Title of cause.*]

STATE OF NEW YORK, }  
 Saratoga County, } ss.

J. E., solicitor for the complainant in this cause, being duly sworn, deposeseth and saith, that the defendants N. O. and P. R. have appeared in said cause; that on the — day of — last, this deponent personally served upon W. H., Esq., solicitor for said defendants, a copy

of the bill of complaint filed in this cause, with notice that an order had been entered, requiring said defendants to plead or demur to said bill within ten days after such service, or that in default thereof this suit would be revived and proceed in their names as defendants; that although more than ten days have elapsed since such service, the said defendants have not, nor hath either of them, put in any plea or demurrer to said bill.

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No. 300.

*Order to revive.*

See ante, p. 49.

At, etc. [*as in No. 255.*]

[*Title of cause.*]

On reading and filing an affidavit showing the default of the defendants N. O. and P. R., executors of C. D., in not pleading or [\*VOL. II, 541] \*demurring to the bill of revivor filed in this cause, within the time required by the order of this court made on the — day of — last; and on motion of Mr. E., solicitor for the complainant, no one appearing on the part of the defendants, ordered that this suit stand revived, and proceed against the said N. O. and P. R., executors as aforesaid, as defendants.

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No. 301.

*Order on complainant's neglecting to obtain order to revive.*

See ante, p. 49.

At, etc., [*as in No. 255.*]

[*Title of cause.*]

On reading and filing an affidavit showing the default of the complainant in not obtaining an order to revive this suit, on motion of W. H., solicitor for defendants, and on hearing Mr. J. E., solicitor for the complainant in opposition thereto; ordered that the complainant do proceed and obtain such order to revive, within ten days after notice of this order, or that the bill of revivor filed in this cause be dismissed, with costs, [*or, that said defendants be at liberty to draw up such order.*]

## No. 302.

*Demurrer to bill of revivor for want of privity.*

See ante, p. 50.

IN CHANCERY,  
Before the Chancellor.

The demurrer of C. D., defendant, to the bill of revivor of A. B., administrator, etc. complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth, doth demur thereto; and for cause of demurrer showeth that the said complainant as administrator *de bonis non* of E. F., who was administrator of G. H., deceased, in the said bill named, prays in his said bill that the proceedings in such bill stated to be abated by the death of the said E. F., may be revived; whereas it appears by the said complainant's bill that there is no privity between the said complainant as administrator *de bonis non* of E. F. and this defendant, to enable the [\*VOL. II, 542] said complainant \*to call on this defendant for payment of any debt due to the estate of the said G. H.

Wherefore, and for divers other defects and causes of demurrer appearing in the said bill of revivor this defendant doth demur thereto, and demands the judgment of this honorable court whether he shall be compelled to make any answer to the said bill; and prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

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 No. 302.
*Plea to a bill of revivor.*

See ante, p. 53.

IN CHANCERY,  
Before the Chancellor.

The plea of C. D., defendant, to the bill of revivor of A. B., complainant.

This defendant, by protestation, not confessing or acknowledging all, or any of the matters and things in the said complainant's bill of



complaint mentioned and contained, to be true, in such sort, manner and form as the same are therein set forth and alleged, for plea to the whole of the said bill, saith that the said complainant is not, as stated in the said bill of revivor, the personal representative of G. B., deceased, the testator therein named, and as such, entitled to revive the said suit, in the said bill of revivor mentioned, against this defendant; but the said complainant is the administrator only of N. M., late of, etc., deceased, who died intestate on the — day of — last, and was the sole executor of the said G. B.; and that letters of administration of the personal estate and effects of the said G. B., unadministered by the said M. N., in his life time, have, since the death of the said M. N., been duly granted by the surrogate of the county of Rensselaer, to E. F., of, etc. who thereby became and now is, the legal personal representative of the said G. B.

Therefore this defendant demands the judgment of this honorable court, whether he shall be compelled to answer the said complainant's bill of revivor; and prays to be hence dismissed with his reasonable costs in this behalf sustained

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[\*VOL. II, 543]

\*No. 303.

*Answer to bill of revivor.*

See ante, p. 54.

IN CHANCERY,  
Before the Chancellor.

The answer of C. D., executor of T. D., deceased, defendant, to the bill of revivor of A. B., complainant.

This defendant, now, and at all times hereafter, saving, etc., [*as in No. 84 to the (\*)*], says he believes it to be true, [*answer the charges in the bill, in same manner as other bills,*] and this defendant saith, that he is a stranger to the several other matters and things in the said bill of revivor inquired after; but submits that the said suit, and the proceedings had therein may stand, and be revived against him this defendant as such executor as aforesaid. And this defendant denies all combination, etc. [*conclude as in No. 84, from the (†).*]

## No. 304.

*Answer to original bill and bill of revivor together.*

IN CHANCERY,  
Before, etc.

The answer of E. F., executor of C. D., deceased, to the original bill of A. B., complainant, against the said C. D., defendant; and to the bill of revivor of the said A. B. complainant, against the said E. F. as such executor, defendant.

This defendant, now, and at all times hereafter saving and reserving unto himself all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bills of complaint, respectively contained, for answer unto the said bills respectively, or unto so much, or such parts thereof as this defendant is advised is material for him to make answer unto; he answers and says as follows, that is to say: this defendant for answer to the said original bill, says, [*answer the original bill;*] and this defendant further answering unto the said complainant's said bill of revivor, answers and says, that, etc., [*answer bill of revivor.*]

And this defendant denies all, and all manner of unlawful combination, etc., [*conclude as in No. 84, from the (f).*]

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[\*VOL. II, 544]

\*No. 305.

*Order to revive, on answer consenting to revival.*

See ante, p. 55.

At, etc. [*as in No. 255.*]

[*Title of cause.*]

On reading and filing the answer of the defendant C. D. to the bill of revivor filed herein, submitting that this suit and the proceedings had therein, may stand and be revived against him, and on reading due proof of service of notice of this motion on the solicitor for the said defendant, and on motion of J. E. solicitor for the complainant, ordered that this suit and the proceedings had therein do stand and be revived against the said defendant, and be in the same plight and condition as the same were in at the time of the abatement thereof.

## CHAPTER II.

## SUPPLEMENTAL BILL.

No. 306.

*Supplemental bill to introduce new matter which existed at the time of filing the original bill.*

See ante, pp. 60, 70.

[Commence as in No. 1.] Complaining, sheweth unto your honor, your orator A. B., of etc. That on or about, etc., your orator exhibited his original bill of complaint in this honorable court, against C. D. the defendant herein after named, as defendant thereto, thereby stating a certain memorandum of agreement, dated the 5th day of July, 1839, and made between E. W. therein described, of the one part, and your orator of the other part, and signed by the said E. W., whereby the said E. W. agreed to sell to your orator a certain lot or piece of land, called, etc., therein particularly described, and of which the said E. W. was seized in fee, for the sum of \$500; and further stating the delivery by the said E. W., of the abstract of his title, and the acceptance of such title by your orator; and further stating the death of the said E. W. intestate, and that he left the said J. W., his only son and heir at law; and that letters of administration of the estate and effects of [\*VOL. II, 545] the said E. \*W., had been granted by the surrogate of the county of —, to the said J. W.; and further stating applications on the part of your orator to the said J. W., to perform the said agreement so entered into by his father as aforesaid, and his refusal to do so; and charging that the said lot or piece of land, called, etc., formed part of a considerable estate called Hesseltine, the whole of which had, before the date of the said contract for sale, been mortgaged by the said E. W., to one J. S. for \$12,000, which mortgage debt was still due and owing; and charging, that the said E. W. would, if living, be found to redeem the said mortgage, in order to convey the said lot or piece of land to your orator free from incum-

brances, and that the said J. W. was bound to do so, to the extent of his father's assets, which your orator charged were amply sufficient for the same; and praying that the said J. W. might be decreed specifically to perform the said agreement so entered into by the said E. W. as aforesaid, and to convey and procure all proper parties to join in conveying the said lot or piece of land comprised in the said agreement, to your orator, or as he should direct, upon your orator paying to the said J. W. the sum of \$500, which your orator thereby offered to do, and in all respects to perform the said agreement on your orator's part; and in case the said J. W. should not admit assets of his said father, sufficient to enable him to perform the said agreement, then that the usual accounts of the real and personal estate of the said E. W. might be taken; and that your orator might have such other or further relief in the premises, as the circumstances of his case might require, and to your honor should seem meet.

And your orator further showeth unto your honor that the said J. W., being duly served with process of subpoena, appeared to your orator's said bill, and put in his answer thereto, whereby he alleged, among other things, that he could not perform the said agreement of the 5th day of July, 1839, without first redeeming the said mortgage so made to the said J. S. as aforesaid, and that the assets of the said J. W. were not sufficient to enable him to do so.

And your orator further showeth that the said answer has been replied to by your orator, and witnesses have been examined on both sides, but the proofs have not yet been closed; as by the said bill and proceedings, now remaining as of record in this honorable court, reference being had thereto, will appear.

And your orator further showeth, by way of supplement, that your orator has lately, and since the examination of witnesses in the said cause, discovered, as the fact is, that the said J. S. now is and always since the date of the said agreement, has been, ready and willing to [\*VOL. II. 546] \*concur in conveying the said lot or piece of land to your orator discharged from his said mortgage, upon receiving your orator's purchase money in discharge, *pro tanto*, of the said mortgage debt.

And your orator charges that such information was first given to your orator by means of a letter addressed by the said J. S. to Mr. L. your orator's solicitor, and dated, etc., part of which was in the words and figures following, that is to say:—“Mr. W.'s refusal to carry into effect his agreement with Mr. B. is unaccountable to me, because he

knows that I have always been willing, and even desirous, to confirm the sale, and to release the premises from my mortgage, on receiving the \$500 towards my debt. This, in fact, was understood between his father and myself at the time when the sale to Mr. B. was made ;” as by such letter, reference being had thereto, will more fully appear.

And your orator charges therefore, that it is unimportant whether the said J. W. has assets of his father, sufficient to redeem the mortgage debt so due to the said J. S. as aforesaid ; inasmuch as the said J. S. is willing to be partially redeemed, and the purchase money of your orator is sufficient for that purpose.

And your orator charges that the said J. W ought to be decreed to join with the said J. S. (whose concurrence your orator undertakes to procure) in conveying the said lot or piece of land to your orator, upon payment by your orator of the said sum of \$500 to the said J. S., in part discharge of his said mortgage debt.

To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief hereby prayed, and may upon his corporal oath, according to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the matters aforesaid, as fully and explicitly as if the same were here repeated and he particularly interrogated thereto ; and more especially that he may answer and set forth, in manner aforesaid, whether your orator did not, on or about, etc., or at some other and what time, exhibit his original bill of complaint in this honorable court against such person, and of or to such purport or effect, as hereinbefore in that behalf stated, or against some other and what person, and of or to some other and what purport or effect, or how otherwise ? And whether thereupon such proceedings were not had in the said cause as are hereinbefore in that behalf stated, or how otherwise ? And whether your orator has not, since the examination of witnesses in the said cause, or at some other and what period, discovered, and whether it is not the fact, that the said J. S. now is, and whether or not he always, since the date of the said agreement, [\*VOL. II, 547] has been, ready \*and willing to concur in conveying the said lot or piece of land to your orator, discharged from his said mortgage, upon receiving your orator’s purchase money in discharge, *pro tanto*, of the said mortgage debt, or how otherwise ? And whether such information was not first given to your orator by means of such letter as hereinbefore in that behalf stated, or some other and what letter, or by some other and what means, or how otherwise, and when

was such information first given to your orator? Whether such letter as is hereinbefore mentioned to bear date, etc. was not addressed by such person to such person, and whether it was not of such date, and partly in such words and figures, or of or to such purport or effect, as hereinbefore in that behalf stated, or addressed by some other and what person or persons, to some other and what person or persons, of some other and what date, and (with respect to the part thereof hereinbefore in that behalf mentioned) in some other and what words and figures, or of or to some other and what purport or effect, or how otherwise? Whether it is not, and whether not for the reasons hereinbefore in that behalf given, unimportant, for the purposes of these suits, whether the said defendant has assets of his father sufficient to redeem the said mortgage debt, or how otherwise? And whether the said defendant ought not to be decreed to join with the said J. S., in such conveyance as hereinbefore in that behalf stated, or in some other conveyance of the same nature, upon such payment by your orator as hereinbefore in that behalf mentioned, or some other and what payment, or how otherwise; and if not, why not.

And that your orator may have the same relief against the said J. W. as he might have had if the facts hereinbefore stated and charged by way of supplement had been stated in your orator's said original bill. And in case the said defendant shall continue to allege that he has not assets of the said E. W., sufficient for the redemption of the mortgage debt so due to the said J. S. as aforesaid, then that he may be decreed to join with the said J. S. in conveying the said lot or piece of land comprised in the said agreement, of the 5th day of July, 1839, unto your orator and his heirs, or as he shall direct, upon your orator paying to the said J. S., the said purchase money or sum of \$500 towards the discharge of the said mortgage debt; your orator hereby offering to pay such sum, and in all respects to perform the said agreement of the 5th day of July, 1839, on his part, and also undertaking to procure the concurrence of the said J. S. in such conveyance as aforesaid; and that your orator may have such further or other relief in the premises as the circumstances of his case may require, and to your honor shall seem meet. May it please, etc. [*process of subpoena.*]

[\*VOL. II, 548]

\*No. 307.

*Supplemental bill against new parties, who ought to have been made defendants to the original bill.*

See ante, pp. 63, 70.

[*State the filing of the original bill, the object and prayer thereof, and the appearance and answer of the defendant, as in last form.*]

And your orator further showeth, by way of supplement, that your orator has lately discovered, as the fact is, that [*state supplemental matter.*] And your orator charges that the said H. H. and C. N. are by the means aforesaid, interested in the said sum of \$—— and the securities for the same, and are necessary parties to this suit, and that your orator is entitled to have the same relief from his said original bill, as if they had been made parties thereto.

To the end therefore that the said defendants may, if they can, show cause why your orator should not have the same relief hereby, and by his said original bill (*b*) prayed and may upon their several, etc. [*interrogatories as in last form.*] And that your orator may have the same relief from his said original bill as if the said defendants had been made parties thereto, etc. [*prayer for special and general relief and for process of subpoena against the new defendants to answer both bills.*]

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No. 308.

*Supplemental bill against the representative of a defendant who had died before appearance.(c)*

See ante, p. 73.

[*State the filing of the original bill, and the object and prayer thereof as in No. 306.*] And your orator further showeth, that the said E. F., one of the said defendants, being duly served with process, appeared to your orator's said bill, and put in his answer thereto, which answer was replied to. And your orator further showeth, that the said cause came on to be heard before, etc. [*state interlocutory decree.*] And your orator further showeth, that divers proceedings have been had before

(b) These words should be inserted where the supplemental bill calls for an answer to the original bill. See ante, p. 73.

(c) In such a case the suit could not be revived against the representative.

the master to whom the said cause was so referred as aforesaid, but he has yet made no report thereon; as by such bill and proceedings [\*VOL. II, 549] now remaining \*as of record in this honorable court, when produced, will more fully appear.

And your orator further sheweth, by way of supplement, that your orator has lately discovered, as the fact is, that the said C. T. departed this life at, etc. on, etc., without ever having been served with process of subpoena to appear to your orator's said bill, or having appeared thereto. And your orator further sheweth, by way of supplement, that the said C. T. died intestate; and that on, etc., letters of administration upon the estate and effects of the said C. T. were granted by the surrogate of the county of —, to T. H. the defendant hereto; as by such letters of administration, when produced, will more fully appear.

And your orator charges that by the means aforesaid the said T. H. has become, and now is, the legal personal representative of the said C. T., and is entitled to all such interest, if any, as the said C. T. had, under the said will of the said C. S.

And your orator charges that he ought to have the same relief against the said T. H., as the personal representative of the said C. T., and the same benefit of the said suit and all the proceedings therein, as he might have had against the said C. T. if he had appeared to your orator's said bill, and were now living.

To the end therefore [*call for answer to both bills.*] And that it may be declared by this honorable court that your orator is entitled to have the same relief against the said defendant, as such personal representative of the said C. T., and the same benefit of the said original suit, and of all the proceedings therein as he might have had against the said C. T., if he had appeared to your orator's said bill, and were now living; and that it may be decreed accordingly; and that your orator may have such further or other relief in the premises, as the circumstances of his case may require, and to your honor may seem meet. May it please, etc. [*prayer for subpoena to appear and answer both bills against T. H.*]



## No. 309.

*Supplemental bill upon the bankruptcy of defendant.*

See ante, pp. 66, 73.

*Commence as in No. 1.]* Complaining, show unto your honor, your orators A. B. and C. D. of, etc.; that your orators did, on or about the — day of —, exhibit their original bill of complaint in this honorable court, against W. D. and others, thereby stating, as therein is particularly stated, and praying [*state the prayer verbatim,*] as in and [\*VOL. II, 550] by \*the said bill of complaint now remaining as of record in this honorable court, reference being thereunto had, may and will appear. And your orators further shew unto your honor that the said defendants being served with process of subpoena, appeared to the said bill, but have not yet put in their answers thereto. And your orators further show unto your honor, by way of supplement, that since their said bill was filed, that is to say, on or about the — day of —, the said W. D. owing debts and being under engagements which he was unable to meet, which debts had not been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary character, did present a petition to the district court of the United States, for the southern district of New York, praying for the benefit of the act entitled “An act to establish a uniform system of bankruptcy throughout the United States,” passed August 19, 1841.

And your orators further show unto your honor, that such proceedings were had in the said district court of the United States for the southern district of New York, upon the said petition, that afterwards, that is to say, on the — day of —, a decree was made by the said court, declaring the said W. D. a bankrupt, pursuant to the act aforesaid; by virtue of which decree all the property, effects, and rights of property of the said W. D. became divested out of him, and vested in C. H. W., the official or general assignee in bankruptcy, appointed and designated under the rules and regulations of the said district court, [*or vested in W. L. who was appointed by the said district court assignee of the said bankrupt.*]

And your orators further show unto your honor, that such further proceedings were had upon such petition, in the said district court, that the said bankrupt having surrendered to the said assignee all his property and rights of property (with the exception of such articles as

were designated and set apart by such assignee, and his household and kitchen furniture,) and having complied with and obeyed all the orders and directions of the said district court, did on the — day of —, receive from the said court his final discharge and certificate as such bankrupt.

And your orators further show unto your honor, that since the decree of the said district court, declaring the said W. D. a bankrupt, and under, and by virtue thereof, the said C. H. W., assignee as aforesaid, has got into his custody or power, all and every the moneys, and securities for money, goods and effects of the said W. D., (with the exception aforesaid,) including those belonging to, and obtained from your orators, as in the said original bill of complaint is particularly mentioned, \*which were in the hands, custody, or power of the said W. D. at the time he was declared a bankrupt as aforesaid. And the said C. H. W. not only refuses to discover unto your orators any part of the effects so surrendered by said bankrupt, and taken possession of by the said C. H. W. as such assignee as aforesaid, but threatens to commence some action or actions against your orators upon some of the securities for money obtained from your orators, at the time and in the manner in the original bill of complaint particularly mentioned.

To the end therefore, that the said defendant C. H. W., may answer all and every the matters and things herein before charged by way of supplement; and that your orators may have the full benefit of the said suit and proceedings against the said C. H. W., and that they may have such, and the same relief against the said C. H. W., as in and by the said original bill is prayed against the said W. D., and that the said C. H. W. may be restrained by the injunction of this honorable court from commencing, or bringing any action or actions whatsoever against your orators, or either of them, or otherwise molesting them, or either of them, or their, or either of their estate or estates, touching, or concerning any of the matters in the original bill of complaint particularly mentioned, and also from negotiating, or parting with any of the bills, bonds, or warrants of attorney, executed by your orators, as in the said original bill of complaint is particularly mentioned, which now remain in the hands, custody, or power of the said defendant; or that your orators may have such further and other relief in the premises, as the circumstances of their case shall require, and as to your honor shall seem meet.

May it please [*prayer of process of subpœna against C. H. W.*]

## No. 310.

• *Petition for leave to file supplemental bill.*

See ante, p. 73.

[Commence as in No. 251.] The petition of A. B., the above complainant, respectfully showeth, that on or about the — day of —, your petitioner filed his bill in this honorable court, against C. D., for the purpose of [*state general object of original bill,*] and praying [*state the prayer verbatim.*]

And your petitioner further shows, that the said C. D., being served with process of subpœna, appeared to the said bill (\*), but has not yet put in his answer thereto. That after the appearance of the said defendant was entered, that is to say, on or about the — day of —, [\*VOL. II, 552] and \*before any further proceedings were had in the said cause, [*state the supplemental matter ;*] wherefore your petitioner is advised, that it is necessary to bring the said C. H. W. before this court, as a party defendant to this suit.

Your petitioner therefore prays that leave may be granted to him to file a supplemental bill against the said C. H. W., for the purpose of making him a party defendant to this suit, with proper and apt words to charge him as such, and with such prayer for relief as may be proper, and for such other, etc.

## No. 311.

*Demurrer to supplemental bill.*

See ante, p. 75.

IN CHANCERY,  
Before, etc.

The demurrer of C. D., defendant, to the supplemental bill of A. B., complainant.

This defendant, [*as in No. 73, to the (†), then,*] that this defendant, as appears by the said supplemental bill, is not a party to the original bill therein in part stated and set forth; nor does it appear by the said supplemental bill, that any new matter has, or is pretended to have arisen, since the said original bill was filed, or that there is any reason why this defendant should not, if necessary, be made a party thereto by amendment. Wherefore, etc., [*conclude as in No. 73.*]

No. 312.

*Plea to supplemental bill*

See ante, p. 76.

IN CHANCERY,  
Before the Chancellor.

The plea of C. D., defendant, to the supplemental bill of A. B., complainant.

[As in No. 78 to the (†) then] the several matters and things in the said complainant's present bill stated and set forth by way of supplement, arose, and were well known to the said complainant, before and at the time the said complainant filed his original bill in this cause; and that such said several matters and things can now be introduced, and ought so to be, if necessary, by amending the said original bill. Wherefore [*conclude as in No. 78.*]

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[\*VOL. II, 553]

## \*CHAPTER III.

## BILLS IN THE NATURE OF BILLS OF REVIVOR.

No. 313.

*Form of bill.*

See ante, pp. 81, 83

[*Commence as in No. 1.*] Complaining, showeth unto your honor your orator A. B., of, etc. That on or about the — day of —, one G. H., of, etc. filed his bill of complaint in this honorable court against C. D., of, etc. thereby stating [*set forth the material parts of a bill for the specific performance of a contract to convey land*] and praying [*set out prayer verbatim.*] That the said C. D., being served with process of subpœna, appeared to the said bill and put in his answer thereto, and that the said G. H. replied thereto, and that the said cause being at issue, witnesses were examined on both sides and proofs closed; as by the said bill, answer and proceedings now remaining as of record in this honorable court, reference being thereto had, will more fully appear.

And your orator further showeth that before any further proceedings were had in the said suit, and on the — day of —, he, the said G. H., departed this life, leaving J. H., the other defendant herein-after named, his only son and heir, him surviving, and having previously made and published his last will and testament in writing, bearing date the — day of —, and executed and attested so as to pass real estate, and having thereby given and devised the said messuage and hereditaments so contracted to be purchased by him as aforesaid to your orator, his heirs and assigns, and having appointed your orator sole executor thereof; as in and by the said will, when produced, will more fully appear.

And your orator further showeth that the said will was on, etc. duly proved by your orator before the surrogate of the county of —, whereby your orator became the legal personal representative of the

said G. H., as by the letters testamentary issued by said surrogate, will more fully appear.

And your orator charges that, by virtue of the devise so made to your orator as aforesaid, he is entitled to stand in the place of the said [\*VOL. II, 554] \*G. H., with respect to the said agreement of the — day of —, and to have the same specifically performed, and to have the said message and hereditaments conveyed by the said C. D., to your orator and his heirs, upon payment of the said sum of \$—, which sum your orator hereby offers to pay.

And your orator charges that by the death of the said G. H., the said suit and proceedings became abated, but that your orator is, as he is advised, entitled to have the same revived against the said C. D. and to have the same relief against him as the said G. H. would be entitled to, if he were still living.

And your orator charges that the said J. H., as heir-at-law of the said G. H., sometimes, though without any ground, questions the validity of the said devise to your orator, and is therefore as your orator is advised, a necessary party to this suit.

To the end, therefore, that the said defendants may, if they can, show why the said suit and proceedings should not be revived, and your orator have the relief hereby prayed, and may, upon their several and respective corporal oaths, according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to all and singular the premises, and more particularly, whether, etc.

And that it may be declared that your orator, as such devisee of the said G. H., as aforesaid, is entitled to revive the said suit and proceedings so become abated as aforesaid and to have the benefit thereof; and that the said suit and proceedings may be decreed to stand and be revived accordingly and to be in the same plight and condition as they were in at the time of the said abatement; and that your orator may have the same relief against the said defendant C. D., as the said G. H. would be entitled to, if he were still living; and if necessary for that purpose, that the said will of the said G. H. may be established; and that your orator may have such further, etc. [*Prayer for subpœna against C. D. and J. H.*]

[\*VOL. II, 555]

## \*CHAPTER IV.

## BILLS IN THE NATURE OF SUPPLEMENTAL BILLS.

## No. 314.

*Original bill in the nature of a supplemental bill.(a)*

See ante, pp. 84, 85.

[*Commence as in No. 1.*] Complaining, show unto your honor your orator A. B. of, etc. That [*state the giving of a mortgage to W. D. by defendant C. D., the non-payment of the money, that mortgage became absolute, and mortgagee entered into possession. State also amount due at time of filing original bill.*]

And your orator further showeth unto your honor, that on the — day of —, the said W. D. exhibited his original bill of complaint in this honorable court against the said C. D. as defendant thereto, thereby stating the matters and things hereinbefore stated, and praying that an account might be taken by and under the direction and decree of this honorable court, of what was due to him for principal and interest on his said mortgage, and that the said C. D. might be decreed to pay to him, the said W. D., or as he should direct, the amount of what should be so found due to him, together with the costs of that suit, by a short day to be appointed for that purpose by this honorable court, the said W. D. being ready and willing, and thereby offering, upon such payment being made, to reconvey the said mesuage and hereditaments to the said C. D., or as he should direct; or that in default of such payment being made [*usual prayer for strict foreclosure.*]

And your orator further showeth that the said C. D., being duly served with process, appeared to the said bill and put in his answer thereto, to which the said W. D. replied, and that the said cause being at issue, witnesses were examined on both sides and the proofs closed;

(a) By the assignees of a sole complainant who became bankrupt *pendente lite*.

as by such bill, answer and proceedings now remaining as of record in this honorable court, reference being thereto had, will more fully appear.

And your orator further showeth that before any further proceedings were had in the said cause, and on or about, etc., the said W. D. did present a petition to the district court of the United States for [\*VOL. II, 556] the \*northern district of New York, praying for the benefit of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," passed August 19, 1841. And such proceedings were thereupon had that afterwards, that is to say, on, etc., by a decree of the said district court, the said W. D. was declared a bankrupt pursuant to the act aforesaid; by virtue of which decree all the property, effects, and rights of property of the said W. D. became divested out of him and vested in your orator as the official or general assignee in bankruptcy appointed and designated under the rules and regulations of the said district court, [*or in your orator who was appointed by the said district court assignee of the said bankrupt.*] As by the said petition, decree, and other proceedings now remaining as of record in the said district court, reference being thereto had, will more fully appear.

And your orator further showeth that as such assignee in bankruptcy he has entered into possession, or into the receipt of the rents and profits of the said mortgaged premises.

And your orator charges that by virtue of his said appointment, he has become entitled to the said sum of \$—— so due and owing for principal and interest as aforesaid, or to such other sum as shall be found to be now due and owing for principal and interest on the said mortgage.

And your orator charges that by the said bankruptcy of the said W. D. the said suit so instituted by him has become defective, but that your orator, as such his assignee as aforesaid, is entitled to have the benefit of such suit and of the proceedings therein, and to prosecute the same against the said C. D. from the period when it so became defective as aforesaid, and that for that purpose this his bill ought to be taken as supplemental to the said bill of the said W. D.

To the end therefore, that the said defendant may, if he can, show why your orator should not have the relief hereby prayed, and may upon his corporal oath, according to the best and utmost of his knowledge, remembrance, information and belief, full, true, direct, and perfect answer make to all and singular the premises, and more



particularly whether, etc. And that it may be declared that your orator, as such assignee as aforesaid, is entitled to have the benefit of the said original suit and of the proceedings therein; and that your orator may be at liberty to prosecute the same against the said defendant from the period when the said original suit so became defective by the bankruptcy of the said W. D. as aforesaid; and that for that purpose this bill may be taken as supplemental to the said bill of the said W. D.; and that your orator may have the same relief against the said defendant as the said W. D. might have had if he [\*Vol. II, 557] had not become bankrupt; and that your orator \*may have such other and further, etc. [*prayer for subpœna against defendant.*]  
 (See White on Sup. & Rev. 279.)

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No. 315.

*Bill to carry decree into execution.*

See ante, p. 86.

[*Commence as in No. 1.*] Complaining showeth unto your honor your orator A. B., of, etc.; that your orator, on or about —, filed his bill of complaint in this honorable court against C. D., stating [*set out substance of a bill for partition*] and praying [*set out prayer verbatim.*]

And your orator further showeth, that process of subpœna being served upon the said defendant, he appeared to the said bill and put in his answer thereto, to which a replication was filed. And the said cause being at issue, the same came on to be heard before your honor on or about —, when a decree was made by your honor directing that a commission should issue to certain commissioners to be therein named, to make partition of the estate in question, and that the said estate was to be divided and separated, and one-third part thereof set out in severalty and declared to belong to the said E. B. and his heirs; and the remaining two-third parts thereof, declared to belong absolutely to your orator, to be held in severalty by him; and the respective parties were decreed to convey their several shares to each other, to hold in severalty according to their respective undivided shares thereof; and that it should be referred to P. G., one of the masters of this court residing in the county of — to settle the conveyances, in case the parties differed about the same; as by the said proceedings

and decree now remaining as of record in this honorable court, reference being thereunto had, will more fully appear.

And your orator further showeth unto your honor, that the commission awarded by the said decree never issued, on account of the said E. B. going abroad, and being, until lately, out of the jurisdiction of this honorable court; but the said E. B. having now returned, and the inconvenience mentioned in your orator's former bill still existing, your orator is desirous of having the said decree forthwith carried into execution, but from the great length of time which has elapsed, and the refusal of the said C. D. to concur therein, your orator is advised the same cannot be done without the assistance of this honorable court.

To the end therefore that the said C. D. may upon his corporal oath [\*VOL. II, 558] \*[interrogatories in usual form.] And that the said decree may be directed to be forthwith carried specifically into execution; and the said C. D. ordered to do and concur in all necessary acts for that purpose. May it please, etc. [*prayer for subpoena against defendant, as in No. 1.*]

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No. 316.

*Plea to bill to carry decree into execution.*

IN CHANCERY,  
Before the Chancellor.

The plea of C. D. defendant, to the bill of complaint of A. B. complainant.

This defendant [*as in No. 78 to the (†),*] he is advised that the complainant by his bill, claims to be entitled to divers lands in his said bill mentioned, for the term of his life, by virtue of the last will and testament of A. B., in the said bill mentioned, to bear date the — day of —, and prays that he may have the benefit of a certain decree of this honorable court, made in a cause wherein the said A. B. was complainant, and this defendant was defendant, and that such decree may be carried into execution; to which bill this defendant doth plead, and for plea saith, that the will of the said A. B., in the complainant's bill mentioned, was not duly executed and attested, so as to pass real estates, and therefore the lands therein, and in the said complainant's

said bill mentioned, descended to E. D., of, etc., as the heir-at-law of the said A. B. ; wherefore this defendant is advised that the complainant is not entitled to have the benefit of the decree, or to have the same carried into execution ; and this defendant demands the judgment of this honorable court, whether he shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and prays to be hence dismissed, with his reasonable costs in this behalf sustained.

[\*VOL. II, 559]

## \*CHAPTER V.

## BILLS OF REVIVOR AND SUPPLEMENT.

No. 317.

*Form of bill.*

[Commence as in No. 1.] Complaining, showeth unto your honor, your orator A. B., of, etc. That your orator did, on or about —, exhibit his original bill of complaint in this honorable court, against C. D., of, etc. whereby [*set forth so much of the bill, with the prayer as may be necessary ;*] and the said C. D., being duly served with process of subpoena for that purpose, appeared and put in his answer thereto, and your orator having replied thereto, witnesses were examined in said cause, on both sides ; as by the said pleadings and other proceedings in the said cause, now remaining as of record in this honorable court, reference being thereunto had will more fully appear.

And your orator further showeth unto your honor, that before any further proceedings were had in the said cause, and on or about the —, the said C. D. departed this life, without issue, leaving G. H., of, etc., a defendant hereinafter named, his heir at law ; and the said suit, and the proceedings therein having become abated by the death of the said C. D., your orator, as he is advised, is entitled to have the same revived against the said G. H., as the heir of the said C. D., and restored to the same condition in which they were at the time of his death.

And your orator, by way of supplement showeth unto your honor, that the said C. D., in his lifetime, duly made and published his last will and testament in writing, in such manner as is by law required for passing real estates, bearing date, etc, and thereby devised all his real estate to J. T. and G. M., and their heirs forever ; as in and by the said last will and testament, reference being thereto had, will more fully appear.

And your orator further showeth, that the said C. D. departed this life, at the time above specified, without having altered or revoked his

said will ; and that the said J. T. and G. M., respectively claim to be interested in the said messuages, lands and tenements, by virtue of the said will ; and therefore your orator is, as he is advised, entitled to the benefit of the said suit against them, as being or claiming to be so interested, and to the like relief as he would have been entitled to against the said C. D., if he were still living ; and the said G. H., as such heir at law as aforesaid, at times disputes the validity of the said will.

\*To the end, therefore, that the said suit and pro- [\*VOL. II, 560] ceedings so abated as aforesaid, may stand revived against the said G. H., as heir-at-law as aforesaid, and be in the same plight and condition in which they were at the time of the death of the said C. D., or that the said G. H. may show good cause to the contrary ; and that the said G. H., J. T. and G. M., may upon their several and respective corporal oaths, full, true, and perfect answer make to the several matters aforesaid ; and more especially, they may answer and set forth in manner aforesaid, whether the said C. D. did not, before his death duly make and publish his last will and testament in writing, of the date, or to the purport or effect aforesaid, so far as the same is hereinbefore set forth, or of any other date, or to such or some other, and what effect ? and whether they respectively, or one, and which of them, do, or doth not claim to be in some, and what manner interested in the said real estates, under and by virtue of the said will, or how otherwise ? and that your orator may have the benefit of the said suit and the proceedings therein against the said G. H., J. T. and G. M., who claim to be respectively interested as aforesaid, and such relief as if the said C. D., were still living, he would be entitled to against him.

May it please your honor to grant unto your orator the people's writ of subpœna to revive and answer, issuing out of and under the seal of this court, to be directed to the said G. H., thereby commanding him at a certain day, and under a certain penalty therein to be inserted, personally to be and appear before your honor in this honorable court, then and there to answer the premises, and to show cause if he can, why the said suit, and the proceedings therein had, should not stand and be revived against him, and be in the same plight and condition as the same were at the time of the abatement thereof ; and further to stand to and abide, such order and decree in the premises, as to your honor shall seem meet.

And may it please your honor to grant unto your orator the peo-

ple's writ of subpœna, issuing out of, and under the seal of this court, directed to the said J. T., and G. M., thereby commanding them, and each of them, at a certain day, and under a certain penalty therein to be inserted, personally to be and appear before your honor, in this honorable court, and then and there, full, true, direct and perfect answer make to all and singular the premises, and further to stand to, perform and abide such order and decree therein as to your honor shall seem meet.

And your orator, etc.

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[\*VOL. II, 561]

## \*CHAPTER VI.

## BILLS OF REVIEW.

No. 318.

*Bill of review for errors of law.*

See ante, p. 91.

[*Commence as in No. 1.*] Complaining, showeth unto your honor, your orator A. B., of, etc. That on or about —, C. D., of, etc. (the defendant hereinafter named,) exhibited his bill in this honorable court, against your orator, and thereby set forth, that [*insert substance of original bill,*] and praying, [*set out prayer verbatim.*] And your orator being served with a subpoena for that purpose appeared and put in his answer to the said bill, to the effect following. [*insert substance of answer.*] And the said C. D. replied to the said answer, and issue having been joined, and witnesses examined, and the proofs closed, the said cause was brought to a hearing before your honor, on the — day of —, when a decree was pronounced (\*), which was afterwards settled and entered; by which it was ordered, adjudged and decreed, that [*set forth the decree.*]

And your orator further shows unto your honor, that the said decree has since, and on or about the — day of —, been duly signed and enrolled; which said decree your orator insists is erroneous, and ought to be reviewed, reversed, and set aside for many apparent errors and imperfections, inasmuch as it appears by your orator's answer. [*Here insert the apparent errors.*] And no proof being made thereof, no decree ought to have been made or grounded thereon, but the said bill ought to have been dismissed, for the reasons aforesaid. For all which errors and imperfections in the said decree, appearing on the face thereof, your orator has brought this his bill of review, to be relieved in the premises.

In consideration whereof, and inasmuch as such errors and imperfections appear in the body of the said decree, your orator hopes that

the said decree will be reversed and set aside, and no further proceedings had thereon.

To the end therefore, that the said C. D., [*interrogatories in usual form,*] and that for the reasons and under the circumstances aforesaid, the said decree may be reviewed, reversed, and set aside, and no further proceedings taken thereon.

May it please, etc., [*prayer for subpoena in usual form.*]

[\*VOL. II, 562]

\*No. 319.

*Bill of review on discovery of new matter.(a)*

See ante, p. 92.

[*As in the last form to the asterisk, (\*)*] whereby your honor decreed that your orator's title to the premises was valid and effectual; after which the said C. D. petitioned your honor for a re-hearing, and the said cause was accordingly re-heard and a decree of reversal made by your honor, on the ground of the said C. D. being the heir-at-law of the said E. F., deceased; and which said decree of reversal was afterwards duly signed and enrolled; as by the said decree and other proceedings now remaining filed as of record in this honorable court, reference being thereunto had, will appear.

And your orator showeth unto your honor, by leave of this honorable court first had and obtained for that purpose, by way of supplement, that since the signing and enrolment of the said decree of reversal your orator has discovered, as the fact is, that the said E. F. was, in his lifetime, seized in fee of and in the hereditaments and premises in question in the said cause, and that the said E. F., while so seized, and when of sound mind, duly made and published his last will and testament in writing, bearing date on or about —, which was executed by him and attested in such manner as by law is required for passing real estate by devise, and thereby gave and devised unto the said J. W. his heirs and assigns forever, to and for his and their own absolute use and benefit, the said hereditaments and premises in

(a) This is a bill of review, and supplement, and revivor, on discovery of a will, against the real representative of a deceased person in whose favor, as heir-at-law, a decree had been made. It is such a bill as is mentioned ante, p. 98.



question in the said cause (which your orator claims to be entitled to as purchaser thereof, from the said J. W.)

And your orator further showeth unto your honor that since the said decree of reversal was so made, signed, and enrolled as aforesaid, and on or about — the said C. D. departed this life intestate, leaving G. H. of, etc. (the defendant hereinafter named) his heir-at-law, who, as such, claims to be entitled to the said hereditaments and premises, in exclusion of your orator. And your orator is advised and insists that under the circumstances aforesaid, the said last mentioned decree, in consequence of the discovery of such new matter as aforesaid, [\*Vol. II, 563] ought to \*be reviewed and reversed; and that the first decree declaring your orator entitled to the said hereditaments and premises, should stand, and be established and confirmed, and for effectuating the same, the said several proceedings which became abated by the death of the said C. D. should stand and be revived against the said G. H., as his heir-at-law.

To the end, therefore, that the said defendants [*usual interrogatories.*] And that the said suit may be revived against the said G. H., or that he may show good cause to the contrary; and that the said last decree, and all proceedings thereon may be reviewed and reversed, and that the said first mentioned decree may stand and be established and confirmed, and added to, by the said will being declared a good and effectual devise of such hereditaments and premises as aforesaid; and that the said G. H. may be decreed to put your orator into possession of the said hereditaments and premises, and in the same situation in every respect, as far as circumstances will now permit, as your orator would have been in case such last decree had never been pronounced and executed. And that your orator may have such other, etc.

May it please [*prayer of subpœna to revive and answer as in No. 316.*]

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No. 320.

*Petition for leave to file bill of review for errors of law.*

See ante, p. 95.

[*As in No. 310 to the asterisk, (\*)*] and put in his answer thereto; to which a replication was filed. And the said cause being at issue

witnesses were thereupon examined on both sides, and the proofs closed. And that the said cause was brought to a hearing, before your honor on —, whereupon a decree was made to the following effect, [*set forth substance of decree.*]

And your petitioner further shows that such decree has since been duly enrolled; (\*) and that he is advised that the said decree is erroneous and ought to be reviewed and reversed, and set aside for many apparent errors and imperfections, among which are the following: For that [*set forth the errors complained of.*] For all which errors and imperfections in the said decree appearing on the face thereof, your petitioner is desirous of bringing his bill of review, to be relieved in the premises.

Your petitioner therefore prays that leave may be granted to him to [\*VOL. II, 564] \*file a bill of review against the said C. D. for the purpose of having the said decree reviewed, reversed, and set aside; and that no further proceedings may be had under the same.

And your petitioner, etc.

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No. 321.

*Petition for leave to file bill of review upon discovery of new matter.*

[*As in last form to the asterisk (\*).*] And your petitioner further showeth that since the time of pronouncing the said decree, your petitioner hath discovered new matter of consequence in the said cause; particularly that H. M., deceased, the uncle of the said C. D., of whom the said C. D. claims to be sole heir-at-law, left two sons and a daughter him surviving, named respectively, etc.; who were his heirs-at-law; and that such sons and daughter are still alive and residing at, etc., which new matter your petitioner did not know, and could not, by reasonable diligence have known, so as to make use thereof in the said cause, previous to and at the time of pronouncing the said decree.

Your petitioner therefore prays that he may be at liberty to file a bill of review for the purpose of having the said decree reviewed, reversed, and set aside; and that no further proceedings may be had under the same.

And your petitioner, etc.

No. 322.

*Order for leave to file bill of review.*

See ante, p. 95.

At, etc. [*as in No. 255.*][*Title of cause.*]

On reading and filing the petition of C. D., the defendant, praying for leave to file a bill of review in this cause, on motion of Mr. W. H., solicitor for said defendant, and on hearing J. E., of counsel for the complainant, in opposition thereto, ordered that the said defendant, on giving the usual security, be at liberty to file a bill of review touching the several matters in the said petition mentioned, and for relief in the premises, as he may be advised.

[\*VOL. II, 565]

\*No. 323.

*Plea to bill of review.*

See ante, p. 98.

IN CHANCERY,  
Before the Chancellor.

The plea of C. D., defendant, to the bill of review of A. B., complainant.

This defendant, [*as in No. 78 to the (†),*] by the course and practice of this honorable court, no decree ought to be reviewed or reversed, by any original bill, or otherwise than by bill of review for errors apparent in the body of the decree, or upon new matter come to the parties' knowledge after the making of such decree, and that by leave of the court only; wherefore, and for that the said bill of review doth not set forth the decree truly, but alleges new and foreign matters not contained in the decree, and prays process generally to answer, and not to review, this defendant doth plead the said decree, which is in these words following, viz.: [*set forth the decree verbatim,*] as by the said decree now remaining of record in this honorable court may appear. And this defendant demands the judgment of this honorable court, whether he shall be compelled to make any further or other answer to the said bill of review, or any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

No. 324.

*Demurrer to bill of review.*

See ante, p. 99.

IN CHANCERY,  
Before the Chancellor.

The demurrer of C. D. defendant, to the bill  
of review of A. B. complainant.

This defendant [*as in No. 73 to the* (†),] that by the constant rules of this court, no bill of review ought to be admitted to alter or change matters decreed, only for error in law appearing in the body of the decree, as it is drawn up and enrolled, or for new matter arising since the decree, or such matter of which the complainant in the bill of review could not have notice at the time of the decree; but this defendant is advised that the matters assigned by the said bill of review for cause [\*VOL. II, 566] \*of reversal of the said decree, as the same thereby appear by said complainant's bill, are neither any error in law apparent in the body of this decree, nor any such new matter as aforesaid, but a misjudgment in matters of form only, and not in point of right; and that the statement contained in the said bill of review of the abatement of the suit before the decree passed, is merely an exception in point of form. Wherefore [*conclude as in No. 73.*]

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## CHAPTER VII.

## BILLS OF DISCOVERY.

No. 325.

*Form of bill.*

See ante, pp. 101, 104.

[*Commence as in No. 1.*] Complaining, showeth unto your honor, your orator A. B., of etc. That your orator now is, and for several years past has been seized in fee of, or otherwise well entitled to all those three pieces or parcels of land situate, lying and being [*describing them,*] and which were, in the year —, purchased by your orator from C. D., then of, etc. but since deceased, who by certain indentures of lease and release, bearing date the — respectively, and made between the said C. D. of the one part, and your orator of the other part, for the considerations therein mentioned, duly conveyed the same to your orator, his heirs and assigns, forever; as by the said indenture, reference being thereunto had, will appear; and under and by virtue of such conveyance your orator entered into and upon the said premises, of which he has ever since been, and now is, in the actual possession, and your orator hoped to have continued in the uninterrupted enjoyment thereof. But now so it is, may it please your honor, E. D., of, etc. the defendant hereinafter named, combining and confederating [*charge of confederacy as in No. 1,*] upon the decease of the said C. D., obtained possession of, and now has, in his custody or power, all the title deeds, evidences and writings of the said C. D., which not only relate to the said premises so purchased by your orator, as aforesaid, but also to other estates formerly belonging to the said C. D. and which upon his death descended to and became vested in the said E. D., as his heir-at-law. And the said E. D. pretends that he is also [*\*Vol. II, 567*] entitled to the said premises so \*purchased by your orator as aforesaid, and that the said C. D. had no power to dispose thereof; and he has lately brought an action of ejectment in the supreme court of this state against your orator, in order to enforce such

claim; whereas your orator charges that the said E. D. has no right or title whatever to the said premises so purchased by your orator from the said C. D. as aforesaid, but that the said C. D. had good right to sell and dispose thereof, and that his conveyance of the said premises to your orator was, and is valid and effectual; and so it would appear if the said E. D. would discover and set forth the said title deeds, evidences and writings relative thereto, so possessed by him as aforesaid. And your orator charges that there is, or are, some outstanding term or terms of years, prior to your orator's said conveyance, which will defeat your orator's title to the said premises at law, but the said E. D. refuses to discover the particulars thereof and to set forth the said title deeds, evidences, and writings relative to the said premises so purchased by your orator as aforesaid, and threatens and intends to proceed in the said action, without making such discovery as aforesaid, unless he shall be restrained therefrom by the order and injunction of this honorable court, as your orator charges he ought to be, until he shall have so done.

In tender consideration whereof, and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law, and cannot have a complete discovery of the said title-deeds, evidences and writings, and of the several matters aforesaid, without the aid of a court of equity, where matters of this sort are properly cognizable.

To the end, therefore, that the said E. D. and his confederates [*interrogatories as in No. 1.*] And that the said E. D. may make a full and true disclosure and discovery of the several matters aforesaid, to the end that your orator may be the better enabled to defend the said ejectment; and that in the meantime and until the said E. D. shall have made such discovery as aforesaid, he may be restrained, by the order and injunction of this honorable court from further proceedings in the said ejectment, and all further and other proceedings at law whatsoever, against your orator, touching the several matters aforesaid, or any of them.

May it please your honor [*prayer for injunction as ante, p. 359.*] And may it please your honor to grant unto your orator the people's writ of subpœna issuing out of and under the seal of this honorable court to be directed to the said E. D. commanding him by a certain day and under a certain penalty therein to be inserted to be and appear before our chancellor, in our court of chancery, then and there to answer the premises.

And your orator, etc.

[\*Vol. II, 568]

\*No. 326.

*Demurrer to bill of discovery, where the complainant has no interest in the subject.*

See ante, pp. 109, 111.

[As in No. 73 to the (†)] that the said complainant has not alleged, nor does it appear by his said bill, that he has sued out execution and actually taken out a *feri facias* on his said judgment; and that until he has done so, the goods of E. F. in the said bill named are not bound by the said judgment, nor the said complainant entitled to a discovery thereof. Wherefore [*conclude as in No. 73.*]

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No. 327.

*Demurrer to bill of discovery where defendant has no interest.*

See ante, pp. 109, 111.

This defendant [*as in No. 73 to the (†)*] that the said complainant has not, in and by his said bill, stated, or shown that this defendant has, or pretends to have, any right, title, or interest in the matters and things complained of by the said bill, or any of them, or any right on the part of the complainant to call upon this defendant in a court of equity, for a discovery of the said matters and things, or any of them. And that for any thing that appears to the contrary by the said bill, this defendant may be examined as a witness in this suit. Wherefore [*conclude as in No. 73.*]

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No. 328.

*Demurrer to bill of discovery where there is no privity of title between the complainant and defendant.*

See ante, pp. 109, 111.

This defendant [*as in No. 73 to the (†)*] that the said complainant hath not, by his said bill, shown such privity of title between him and

this defendant, or shown any such right or title as entitles him, in a court of equity, to the discovery from the defendant thereby sought. Wherefore [*conclude as in No. 73.*]

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[\*VOL. II, 569]

\*No. 329.

*Demurrer to bill of discovery where the discovery, if obtained, cannot be material.*

See ante, pp. 109, 111.

This defendant [*as in No. 73 to the (†)*] that the said complainant, in and by his said bill, seeks a discovery of the several proceedings therein mentioned to have taken place before the surrogate of the county of — relative to a grant of administration of the personal estate of E. F., deceased, which he states by his said bill, to be material to enable him, the said complainant, as the son and heir-at-law of the said E. F., deceased, to recover possession, by an action at law, of the real estate in the said bill particularly described as in the possession of this defendant; but this defendant is advised that as all such proceedings before the said surrogate relate only to the personal estate of the said testator they cannot, nor can any of them, be material to the said complainant's case, or affect the title to the said real estates. Wherefore [*conclude as in No. 73.*]

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No. 330.

*Demurrer to bill of discovery where the situation of the defendant renders it improper for a court of equity to compel a discovery.*

See ante, pp. 109, 111.

This defendant [*as in No. 73 to the (†),*] that the said complainant, in and by his said bill seeks to discover how this defendant came by the possession of the several goods therein particularly mentioned, whether it was not by fraud, violence, contrivance, or other means, and whether they were not the property of —, from whom, in the said bill, such goods are alleged to have been taken by this defendant



and others; but this defendant is advised that any discovery of the manner in which such goods came into this defendant's possession, would, or might, subject this defendant to fine, or corporal punishment, and also to a forfeiture of the said goods. Wherefore [*conclude as in No. 73.*]

[\*VOL. II, 570]

\*No. 331.

*Plea to a bill of discovery that the complainant's case is not such as entitles a court of equity to assume jurisdiction.*

See ante, p. 111.

This defendant [*as in No. 78 to the (\*)*], for plea to so much and such part of the said complainant's bill as seeks a discovery from this defendant of, etc., this defendant doth plead thereto, and for plea saith that long before the said complainant's bill was filed in this honorable court, and on or about the — day of —, the said complainant commenced a suit in the — court, against this defendant in respect of the matters as to which a discovery is sought by the complainant's bill, and that such suit is still depending in the said court, which, as this defendant avers, is a court of competent jurisdiction to afford the discovery which the said complainant seeks by his said bill. Therefore, this defendant avers and pleads the same to the said complainant's bill, and prays the judgment of this honorable court whether it will hold plea upon and enforce this defendant to answer the said complainant's said bill, for the cause aforesaid.

No. 332.

*Plea to bill of discovery that discovery would subject defendant to a forfeiture.*

See ante, p. 112.

This defendant [*as in No. 78.*] as to so much of the said complainant's bill as prays that this defendant may discover whether this defendant has not assigned to E. F., in the complainant's bill

mentioned, this defendant's right and interest in the indenture of lease in the said bill mentioned, this defendant doth plead in bar of such discovery, and for plea saith, that in the said indenture of lease is contained a provision, whereby it is declared and agreed that in case this defendant shall assign the benefit of the said lease, or in any manner part with his estate or interest in the same, the said lease shall be void. And this defendant further says that he is advised and believes that if he were compelled to make the discovery of the said matters sought by the said bill, such discovery might make this defendant liable to a forfeiture of the said lease. Wherefore this de- [\*VOL. II, 571] fendant demands the judgment of this honorable \*court, whether he should be compelled to make any further answer to so much of the said bill as is hereinbefore pleaded to, and prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

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No. 333.

*Plea to bill of discovery that a discovery would compel defendant to betray confidence as solicitor.*

See ante, p. 112.

This defendant, by protestation, etc., as to so much of the said bill as prays that this defendant may discover whether, etc., this defendant doth plead, and for plea saith, that this defendant hath no knowledge of the matters concerning which a discovery is so prayed, or any of them, except in and by means of the confidence reposed in this defendant as solicitor, employed by N. B., in complainant's bill named. Wherefore [*as in last form.*]

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No. 344.

*Plea to bill of discovery, that the complainant has no interest, having conveyed away the premises.*

See ante, p. 112.

These defendants, by protestation, etc., and for plea to so much of the complainant's bill as seeks to compel these defendants to set forth

and discover their respective titles in and to the lands and tenements in the bill of complaint mentioned, or any part thereof, say, that the said complainant hath sold and conveyed away unto E. F., of, etc., all his estate, title, interest or claim of or to the said lands, and tenements in his said bill of complaint mentioned. Wherefore these defendants are advised that the complainant has no interest of, in, or to the said lands and tenements; and they therefore pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill of complaint in this particular, etc.

[\*Vol. II, 572]

## \*CHAPTER VIII.

## BILLS OF INTERPLEADER.

No. 335.

*Form of bill.*

See ante, p. 120.

[*Commence as in No. 1.*] Complaining, showeth unto your honor your orator A. B., of, etc. That some time in the month of June, 1840, your orator having occasion to borrow the sum of \$700, applied to R. P., of, etc., to lend and advance him the same, and the said R. P., lent and advanced the same to your orator, and your orator gave a promissory note for the said sum of \$700 to the said R. P., bearing date the — day of June, 1840, and payable six months after date.

And your orator further showeth unto your honor, that soon after your orator had borrowed the said sum of \$700 of the said R. P., and had given him the said note for the same, it was by some means discovered, and the said R. P. confessed and acknowledged, as the truth really was, that he had found the said \$700 which he so lent to your orator hid under the floor, or in some other part of an old farm-house, at which the said R. P. had been at work, and which house had for many years been held and occupied by J. W., deceased, and M. his wife, also deceased, as tenants to W. B.

And your orator further showeth, that the said W. B., as the owner of the said house, in which the said sum of money was found, claimed to be entitled thereto, and insisted that the said R. P. should give up the said note of hand which he had so received from your orator for the said sum of \$700 lent to him, and that your orator should give him the said W. B., a fresh security for the same; and the said R. P., conceiving that he was not justly entitled to the said sum of money, agreed to give up the said note of hand to your orator, and that your orator should give a bond for the same to the said W. B., and accordingly the said R. P. did, on or about the — day of —, deliver up

the said note of hand to your orator to be cancelled, and the same was cancelled accordingly.

And your orator further showeth, that on the said — day of —, your orator entered into and executed a bond to the said W. B., in the penal sum of \$1400, conditioned for the payment of \$700 and lawful interest for the same at the time therein mentioned. And the said R. P. was, and is one of the subscribing witnesses to the said bond, as by the said bond when produced, reference being thereunto had, will more fully appear.

\*And your orator further showeth, that H. W. and [\*Vol. II, 573] J. W., who are the administrators of M. W., their late mother, deceased, and executors of their late father, J. W., deceased, claim to be entitled to the said sum of \$700, and have given notice of their said claim to your orator; and in support of such claim they allege that the said farm-house in which the said \$700 was found, was several years ago occupied by their father, the said J. W., and the said M. his wife; and during such time the said J. W., his wife, or one of them, kept or concealed the said money, in the said house, and therefore they insist that the said \$700 is their property, and that your orator ought to pay the same to them, and they threaten to bring an action against your orator if he pays the same to any other person. And the said R. P. now alleges that he never agreed to give his right in the said sum of \$700 and interest, to the said W. B., but he alleges that he was imposed on, in some manner, by the said W. B. in the said transactions, and therefore the said R. P. claims to be still entitled to the said sum of \$700, and insists that your orator is still liable to pay the same to him, and threatens to bring an action against your orator for the recovery thereof.

And your orator further showeth unto your honor, that on or about the — day of — last, the said W. B., although he has no other right to the said money than as landlord of the said house where it was found, brought an action against your orator, in the supreme court of this state, upon the said bond, which suit is not yet at issue, and he threatens to proceed to judgment therein, and to sue out execution against your orator for the said sum of \$700 and interest. And the said H. W., and J. W., and R. P. likewise severally threaten and intend to bring actions against your orator for the recovery of the said sum of \$700 and interest, having given notice to your orator of their claims to the said money, and insist that he should not pay the same but to each of the said claimants.

And your orator further showeth, that when he borrowed the said money from the said R. P., as aforesaid, he was an entire stranger to the circumstance of the same having been found by him as aforesaid; and your orator, by reason of the aforesaid several claims to the said sum of money, does not know to which of the said parties he can safely pay the same; but he is ready and hereby offers to pay the same into this honorable court, in order that the said several parties may interplead and settle their claims thereto among themselves, and he well hoped they would have done so. But now so it is, may it please your honor, that the said R. P., W. B., H. W., and J. W., combining and confederating, etc. [*as in No. 1,*] the said defendants insisting upon [\*Vol. II, 574] your orator's paying the said \$700 and interest, \*to each of them, and each of them threatens to bring an action against him, to compel him to do so. All which actings, etc. [*as in No. 1.*] And your orator, under the circumstances aforesaid, is in danger of being greatly harassed on account of the said sum of \$700 and interest, and cannot safely pay the same without the aid of this honorable court.

And your orator further showeth, that this his bill is not filed in collusion with, or at the instance of, either of the said defendants, but merely of his own accord for relief in this honorable court, upon the case above stated and set forth.

To the end therefore, that the said defendants may upon their several and respective corporal oaths; [*interrogatories as in No. 1;*] and that the said defendants may severally set forth to which of them the said sum of \$700 and interest, doth of right belong and is payable, and how in particular they make out their claim thereto; and that the said defendants may interplead, and settle and adjust their said demands between themselves: your orator being willing and desirous, and agreeing, that the said sum of \$700 and interest, may be paid to such of them to whom the same shall, in the judgment of this honorable court, appear of right to belong; and that your orator may be at liberty to bring and pay the said sum of \$700 and interest into this honorable court, which your orator doth hereby offer to do, for the benefit of such of the said defendants who shall appear to be entitled thereto, and subject to the further order of this honorable court; and that the said defendant W. B., may be restrained by the injunction of this honorable court, from proceeding against your orator in his said action at law upon the said bond, and from instituting or proceeding in any new or other action at law upon such bond, and may deliver the same to your orator to be cancelled; and that all the said defend-

ants may be restrained from commencing any action or actions against your orator, for the recovery of the said \$700 and interest, or touching any of the matters or things aforesaid. And that your orator [*pray for general relief.*]

May it please your honor to grant unto your orator the people's writ of injunction, issuing out of, and under the seal of this court, directed to the said R. P., W. B., H. W., and J. W., their counsellors, attorneys, solicitors, and agents, commanding the said W. B., his attorneys, solicitors, counsellors, and agents, to desist and refrain from proceeding further against your orator in his said action at law upon the said bond, and from instituting or proceeding in any new or other action at law upon such bond: and commanding the said R. P., H. W., and J. W. to desist and refrain from commencing any action or actions against [\*VOL. II, 575] your \*orator, for the recovery of the said \$700 and interest, or touching any of the matters or things aforesaid.

. And may it please your honor, [*prayer for process of subpoena.*]

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No. 336.

*Order for injunction on bill of interpleader.*

See ante, p. 123.

At, etc. [*as in No. 255.*]

[*Title of cause.*]

On filing bill of interpleader in this cause duly verified, and an affidavit [*or containing an averment,*] of non-collusion, together with the certificate of P. G., injunction master of the fourth circuit, allowing an injunction pursuant to the prayer of said bill, on the terms specified in such certificate, on motion of J. E., solicitor for the complainant, ordered that an injunction issue pursuant to the prayer of said bill, upon the complainant paying into the hands of the register of this court, the sum of \$500 mentioned in the said bill.

## No. 337.

*Demurrer to bill of interpleader for not showing any claim of right in defendant.*

See ante, p. 122.

This defendant, [*as in No. 73 to the (†).*] That the said complainant has not, in and by his said bill of interpleader, shown any claim or right, title, or interest whatsoever, in this defendant, in, or to the said estate called A., in the said bill particularly mentioned and described, in respect whereof this defendant ought to be compelled to interplead with E. F., in the said bill named, and the other defendant thereto. Wherefore, [*conclude as in No. 73.*]

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## No. 338.

*Demurrer to bill of interpleader, for not showing any right in complainant to compel defendants to interplead.*

See ante, p. 122.

This defendant, [*as in No. 73 to the (†).*] That the said complainant has not, in and by his said bill, shown any right or title whatsoever, [\*VOL. II, 576] to \*compel this defendant and E. F. the other defendant to the said bill, to interplead. Wherefore, [*conclude as in No. 73.*]

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## No. 339.

*The like, for not showing a claim of right in both defendants.*

See ante, p. 122.

[*As in No. 73 to the (†),*] that the complainant, by his said bill, seeks to compel this defendant and E. F., another defendant in the said bill named, to interplead touching the right of the said E. F. and this defendant, to the sum of \$500 due from the complainant to the estate of G. H., deceased, when it appears by the complainant's own showing,



in his said bill, that he is indebted to the estate of the said G. H. in the sum of \$500, and that this defendant hath alone obtained letters of administration of the personal estate of the said G. H., from the proper surrogate, and that the claim of the said E. F. is only as one of the next of kin of the said G. H. ; wherefore this defendant saith that the complainant has not shown any right to compel this defendant and the said E. F. to interplead touching the matters in the said bill mentioned ; and he demands the judgment, etc. [*conclude as in No. 73.*]

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No. 340.

*The like, for want of affidavit of non-collusion.*

See ante, p. 122.

[*As in No. 73 to the (†),*] that although the said complainant's said bill is, on the face thereof, a bill of interpleader, and prays that this defendant and the other defendants thereto may interplead together concerning the matters therein contained, and may be restrained by injunction from proceeding at law against the complainant, concerning such matters, yet the said complainant hath not annexed to his said bill an affidavit, nor inserted therein an averment, that he doth not collude, concerning such matters, with any of the defendants thereto, which affidavit or averment, according to the rules of this honorable court, as this defendant is advised, ought to have been made and annexed to, or inserted in, the said bill. Wherefore, [*conclude as in No. 73.*]

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[\*Vol. II, 577]

\*No. 341.

*Plea to a bill of interpleader.*

[*As in No 78 to the (†),*] he is advised that the complainant, by his bill, seeks to compel this defendant, and E. F., another defendant to said bill, to interplead touching the sum of \$500 in his said bill mentioned to have been due from the complainant to the personal estate of G. H., deceased ; to which bill this defendant doth plead, and for plea saith, that the said G. H., in his lifetime, made his last will and testa-

ment and appointed this defendant sole executor thereof; and this defendant hath, since his death, duly proved his will before the proper surrogate, and hath obtained letters of administration of the personal estate and effects of the said G. H., to be granted to him by such surrogate, as the executor named in the last said will; and therefore this defendant hath alone a right to receive the said sum of \$500 from the complainant, and to give him effectual discharge for the same; and this defendant doth aver that the title of the said E. F., if any he has to the said sum of \$500, is by virtue of, and under the said will of the said G. H., and as a specific legacy given to him by the said will. Wherefore this defendant is advised the complainant has no right to compel the said E. F., and this defendant to interplead, touching the said sum of \$500. And this defendant demands the judgment, etc. [*conclude as in No. 78.*]

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No. 342.

*Notice of hearing on bill of interpleader where facts are admitted by the answers.*

See ante, p. 124.

[*Title of cause.*]

Sir:

Take notice that this cause will be brought to a hearing upon the bill of interpleader, and upon the answers and replication filed therein, before the chancellor, on the — day of — next, at, etc., at the opening of the court on that day, for a decree that the defendants interplead and settle the matter in controversy in this suit between themselves.

Dated, etc.

To R. S., Solicitor for defendant C. D.,  
and W. H., Solicitor for defendant E. F.

Yours, etc.

J. E., Solicitor for complainant.

[\*VOL. II, 578]

\*No. 343.

*Interlocutory decree on bill of interpleader, directing a reference.*

See ante, p. 124.

At, etc. [as in No. 255.]

[*Title of cause.*]

This cause having been this day brought on to be heard upon the bill of interpleader filed therein, upon the answers of the defendants, and the replication thereto; on hearing Mr. J. N., of counsel for the complainant, and Mr. H. E., of counsel for the defendant C. D., and Mr. W. M., of counsel for the defendant E. F., it is ordered, adjudged and decreed that the said bill of interpleader is properly filed, and that the defendants do interplead and settle the matters in controversy in this suit between themselves; and for that purpose it is ordered, adjudged and decreed that it be referred to one of the masters of this court, residing in the county of —, to inquire and report which of the said defendants is entitled to the fund in controversy and which has been deposited with the register of this court. And if the said master shall be of opinion that any two or more of the said defendants are equitably entitled to share in the same, that he also ascertain and report what portion of the fund belongs to each. And it is further ordered that previous to the examination of any witnesses before the said master, either of the parties may present to such master, on oath, a written statement of his claim and of the facts and circumstances on which it is founded; which statement shall be answered on oath by all the other defendants, to the satisfaction of the said master, and with the like effect as if such answer were filed to a bill of discovery. And that upon such reference either party is to be at liberty to take out a summons and proceed before the said master in such manner as such master shall direct; and that the solicitor of each defendant have notice of all proceedings before the said master, of which notice is required to be given by the practice of this court. And it is further ordered, adjudged and decreed that the said complainant be dismissed with his costs of this suit up to this time, to be taxed, to be paid out of the said fund in court. And this court doth reserve the consideration of all questions of costs as between the said defendants, and all other questions and directions, until the coming in of the master's report; but with liberty to either party to apply for such other instructions or directions to the master as may be necessary or proper pending the reference.

(See *City Bank v. Bangs*, 2 Paige, 573; *Seaton on Decrees*, 339.)

[\*VOL. II, 579]

## \*CHAPTER IX.

## CROSS BILL.

No. 344.

*Form of bill.(a)*

See ante, p. 130.

[*Commence as in No. 1.*] Complaining, showeth unto your honor, your orator A. B. of, etc. (administrator of all and singular the goods, chattels, and credits which were of R. H. late of, etc. deceased, at the time of his death, left unadministered by M. H., late of, etc. in her lifetime, now deceased, and which said M. H., in her lifetime, and at the time of her death, was administratrix of the goods, chattels, rights, and credits, which were of the said R. H., deceased, at the time of his death.) That J. M., late of, etc. deceased, when of sound mind, duly made his last will and testament in writing, and thereby, after bequeathing several pecuniary legacies, gave the residue of his personal estate and effects, subject to the payment of his debts, to his daughter H., then an infant under the age of twenty-one years, but now the wife of J. C. of, etc. (and which said J. C. and H. his wife, are two of the defendants hereinafter named, and thereby appointed R. P. of, etc. (another defendant hereinafter named,) and the said R. H., executors of his said will; as by the said will, reference being thereunto had, will more fully appear.

And your orator further showeth unto your honor, that the said testator died on or about the — day of — without altering or revoking his said will, leaving his said daughter H. him surviving; and upon, or soon after his decease, the said R. P. and R. H., as such executors as aforesaid, duly proved the said will before the proper surrogate, and the said R. P., who principally acted in the execution of the said will, (the said R. H. having only interfered for the sake of

(a) By an administrator de bonis non of a deceased executor, to have a general release executed, of claims on the unadministered estate of such deceased executor; and for an account and indemnity from the said co-executor for what was received by him.

conformity,) under and by virtue of such probate, possessed himself of a considerable part of the said testator's personal estate and effects.

And your orator further showeth unto your honor, that the said R. H. departed this life on or about —, and shortly after his decease [\*Vol. II, 580] letters \*of administration were duly granted to the said M. H., his wife, who died on or about —; and after her decease such letters of administration of the unadministered personal estate of the said R. H., deceased as aforesaid, were duly granted to your orator by the proper surrogate; as by such letters of administration, reference being thereunto had, will appear.

And your orator further showeth unto your honor, that the said R. H., previously to his death, accounted for and paid to the said R. P., as such co-executor as aforesaid, all such part of the personal estate of the said testator as had been received by him, the said R. H., as such executor as aforesaid, and no part of such personal estate remained in the hands of the said R. H. at the time of his decease, previously whereto the said R. H. resided in the country, where his house was robbed, and all papers relative to his acts as such executor as aforesaid, and for which he had so accounted as hereinbefore mentioned, were stolen, and have never hitherto been recovered.

And your orator further showeth unto your honor, that the said J. C. and H. his wife, duly intermarried previously to the said H. attaining the said age of twenty-one years, which she has since done; and after that period the said R. P. duly accounted for the residue of the said testator's personal estate with the said J. C., (who in right of the said H., his wife, became entitled to receive the same,) and thereupon obtained a general release from the said J. C. and H. his wife, of all demands in respect thereof; as by the said release, reference being thereunto had, will appear. And your orator hoped, under the circumstances aforesaid, he would not have been called upon for any account of the administration of the said testator's personal estate. But now so it is, may it please your honor, the said J. C. and H. his wife, combining and confederating [*charge confederacy with R. P. as in No. 1, p. 354,*] have lately filed their bill in this honorable court against your orator as such representative of the said R. H. deceased, as aforesaid, for an account of the personal estate of the said testator J. M. received by the said R. H., deceased, in his lifetime, as such executor as aforesaid, thereby praying that your orator may be decreed to pay the said J. C., in right of his wife, what upon such account, shall appear to be due to the said J. C., in right of the said H. his

wife, out of the assets of the said R. H. ; and to which said bill they have made the said R. P. a defendant, without praying any account or relief against him. And they pretend that there are various receipts and accounts [*particularizing those charged in the original bill*] of the said R. H. deceased, as such executor as aforesaid, as to the personal estate of the said \*testator, which remained unaccounted for by the said R. H. at his decease, and which ought to be paid by your orator. Whereas, your orator charges the contrary thereof to be true [*negating specifically the pretended receipts and accounts,*] and that an account was stated and a settlement of accounts took place between the said R. H., previously to his death, and the said R. P., and that an account has likewise been stated and settled by and between the said R. P. as such surviving executor as aforesaid, and the said J. C., in right of the said H. his wife, since she attained the age of twenty-one years as aforesaid ; and that no demand was ever made on the personal estate of the said R. H., in respect of his accounts, until lately, when the loss of such papers as aforesaid was discovered, and of which loss your orator charges an undue advantage is intended and attempted to be taken. And your orator also charges that the said R. P. abets the said J. C. and H. his wife, in their proceedings, and refuses to indemnify the personal estate of the said R. H. in respect of his accounts in the execution of the will of the said testator J. M. so accounted for by him, and settled with the said R. P. as aforesaid ; and the said R. P. also refuses to inform your orator what he knows of the matters aforesaid, or any of them, and also denies such statements as have been made by him relative thereto.

All which actings and pretences are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator. In tender consideration whereof, and forasmuch as your orator has no remedy without the assistance of a court of equity. To the end therefore [*usual interrogatories as in No. 1.*] And that the said J. C. and H. his wife, may be decreed to execute to your orator, as such administrator of the goods, chattels, and credits of the said R. H., deceased, left unadministered by the said M. H., also deceased, at the time of her death, a general release of all claims and demands upon such unadministered estate and effects of the said R. H., deceased as aforesaid, in respect of all the accounts of the said R. H. in the execution of the will of the said testator J. M. : or that an account may be taken of the said personal estate of the said testator J. M., received by the said R. H., and of his application thereof ; your orator

being willing and hereby offering to pay what, (if anything,) shall appear to be due on the balance of such account; and that the said R. P. may be decreed to indemnify the estate of the said R. H., and your orator, as such administrator thereof as aforesaid, in respect of such part thereof as the said R. H. paid to, or by the order, or for the use of the said R. P.; or otherwise to account for and pay the same to your orator. And that the said J. C. and H. his wife, may be decreed [\*VOL. II, 582] to pay to your orator \*his costs of this suit. And that your orator may have such further and other relief in the premises as to your honor may seem meet, and the circumstances of this case require.

May it please, etc. [*prayer of process of subpœna as in No. 1.*]

And your orator, etc.

[*Usual jurat.*]

*Certificate of counsel to stay proceedings.* (See ante, p. 134.)

I certify that I have perused the within cross-bill, as well as the original bill filed in this cause; and I am of opinion that the within bill is not intended for delay, and that a stay of proceedings in the original suit is necessary for the attainment of justice in the cause.

Dated, etc.

H. S., Counsel.

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No. 345.

*Cross-bill in the nature of a plea puis darrein continuance.*

See ante, p. 131.

[*Commence as in No. 1.*] Complaining, showeth unto your honor, your orator A. B., of, etc. That C. D., of, etc., the defendant hereinafter named, on or about the — day of —, filed his bill of complaint in this honorable court against your orator, thereby praying; [*state the prayer of the bill,*] and your orator being duly served with process of subpœna, appeared and put in his answer thereto, to which answer the said C. D. replied; and issue being thus joined, witnesses were examined on both sides, and the proofs closed; whereupon the said cause was noticed for hearing by the said C. D., before your honor, as by the said bill, and other pleadings and proceedings in the

said cause, now remaining filed as of record in this honorable court, reference being thereunto had, will more fully appear.

And your orator further showeth unto your honor, that the said cause has not yet been heard; and on or about —, the said C. D., by a certain writing of release bearing date the — day of —, did remise, release, and forever quit claim unto your orator, his heirs, executors, and administrators, the several matters and things complained of in and by the said bill of the said C. D., and in question in the said suit, and each and every of them, and of all sums of money then due and owing, or thereafter to become due and owing, together [\*VOL. II, 583] with all, and all manner \*of actions, causes of action, suits, and demands whatsoever, both at law and in equity, or otherwise howsoever, which he the said C. D. then had, or which he should, or might at any time or times thereafter have, claim, allege, or demand, against your orator, for, or by reason or means of any matter, cause, or thing whatsoever, from the beginning of the world to the day of the date of the said deed or writing of release; as by the said release, reference being thereunto had, will appear. And your orator hoped that in consequence of the said release, the said C. D. would not have proceeded in the said suit against your orator; but the said C. D. combining and confederating [*as in No. 1,*] notwithstanding the said release, threatens and intends to proceed in the said suit, and to bring the said cause on for hearing in due course; and he pretends that no such release was ever executed by him, or if so, that the same was obtained by fraud and surprise, and therefore void. Whereas your orator charges that the same was, in every respect, fairly and properly obtained by your orator, and duly executed by the said C. D.

And your orator further charges, that under the circumstances aforesaid, he is unable to put the said release in issue, or to use the same as a plea in bar in the said suit. All which actings and pretences are contrary to equity and good conscience, and tend to the injury and oppression of your orator.

In tender consideration whereof, and forasmuch as your orator has no remedy without the assistance of a court of equity.

To the end therefore, [*interrogatories as in No. 1,*] and that the said release may be established and declared by this honorable court a sufficient bar to any further proceedings by the said C. D. in the said suit; and that the bill of the said C. D. therein, may, under the circumstances, be forthwith dismissed with costs, [*and for general relief as in No. 1.*]

May it please, [*prayer for subpoena as in No. 1.*]



## No. 346.

*Notice of motion for order to stay proceedings in original suit.*

See ante, p. 134.

A. B.	}	Original Bill.
v.		
C. D.		

C. D.	}	Cross Bill.
v.		
A. B.		

Sir: Take notice, [*as in No. 249, to the (\*)*], that the proceedings in the original suit commenced by the above A. B. be stayed, [\*VOL. II, 584] \*until the said A. B. shall have put in his answer to the cross bill, filed against him by C. D. And for such further, etc., [*as in No. 249*]; which motion will be founded on the said cross bill, and the [*affidavits and*] certificate of counsel thereto annexed.

Dated, etc.

Yours, etc.

To J. E., Esq.,

W. H., Solicitor for C. D

Solicitor for A. B.

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 No. 347.

*Order to stay proceedings in original suit.*

See ante, p. 134.

At, etc. [*as in No. 255.*]

[*Title as in last form*]

On reading and filing the cross bill of C. D., to the bill of complaint of A. B., and the affidavits and certificate of counsel thereto annexed, and on motion of W. H., solicitor for the said C. D., and on hearing J. E., of counsel for the said A. B. in opposition thereto, it is ordered, that all further proceedings in the original suit commenced by the said A. B. against the said C. D., be stayed until the said A. B. shall have put in his answer to the cross bill filed against him by the said C. D.

## No. 348.

*Order that original and cross bill be heard together.*

See ante, p. 135.

At, etc. [*as in No. 255.*]

[*Title as in No. 346.*]

On reading and filing affidavits, showing that both the above causes are at issue and ready for hearing, and on motion of J. E., solicitor for C. D., the complainant in the cross bill, ordered that the said causes be brought on for hearing together; provided that the hearing upon the original bill shall not be delayed by any delay or neglect to proceed on the part of the complainant in the said cross bill.

[\*VOL. II, 585]

## \*CHAPTER X.

## BILL TO PERPETUATE TESTIMONY.

No. 349.

*Bill to perpetuate the testimony of witnesses to a will.*

See ante, p. 140.

[*Commence as in No. 1.*] Your orator A. B., of, etc. That C. D., late of, etc., deceased, before, and at the time of making his will herein-after mentioned, was seized in fee of and in, divers freehold estates, which are hereinafter particularly mentioned and described; and the said C. D., being so seized as aforesaid, and being of sound and disposing mind, memory and understanding, duly made and published his last will and testament, in writing, bearing date the — day of —, signed by him the said C. D., and attested and subscribed in his presence by three credible witnesses: and which said will, with the attestation thereof, is in the words and figures following, that is to say: [*set out the will and attestation clause verbatim,*] as by the said will, reference being thereunto had, will appear.

And your orator further showeth unto your honor, that the said C. D. departed this life on or about the — day of —, without having revoked or altered his said will, leaving his brother E. D. of, etc., (the defendant hereinafter named,) his heir-at-law; and upon the death of the said testator, your orator, under and in virtue of the said will, entered upon and took possession of all the said freehold estates thereby devised to your orator for life, and your orator is now in possession thereof. And your orator hoped, that no disputes would have arisen respecting the devises contained in the said will, or the validity thereof. But now so it is, may it please your honor, the said E. D. combining, etc. [*charge of confederacy as in No. 1,*] and contriving how to deprive your orator and his issue of the benefit of the said devise made in their favor, pretends that the said will is void and ineffectual; and although he will not dispute the validity thereof during the lives of the subscribing witnesses thereto, yet he threatens and intends so

to do when they are dead, so that your orator may be deprived of their testimony.

And your orator further showeth that all of the said subscribing witnesses are upwards of seventy years of age and in feeble health, [*or are about to depart from this state,*] and that your orator fears the [\*VOL. II, 586] \*testimony of the said witnesses may be lost by their death [*or departure from the state*] before the cause can be investigated in a court of law.

In consideration whereof, and forasmuch as your orator cannot have the subscribing witnesses to the said will examined, in order to perpetuate their testimony, without the aid of a court of equity; and to the end [*interrogatories as in No. 1.*] And that your orator may be at liberty to have the several subscribing witnesses to the said will examined, and that your orator, if necessary, may have a commission or commissions for the examination of the said subscribing witnesses to the said will, to the end that their testimony may be preserved and perpetuated; and that your orator may be at liberty to read and make use of the same on all future occasions, as he shall be advised.

May it please, etc. [*prayer of process of subpoena, as in No. 1—omitting the word "decree."*]

## CHAPTER XI.

## BILL TO EXAMINE WITNESSES DE BENE ESSE.

No. 350.

*Form of bill.*

See ante, p. 144.

This bill is similar in form to the bill to perpetuate testimony (No. 349,) and can easily be framed from the directions in the text.

No. 351.

*Demurrer to bill to examine witnesses de bene esse.*

See ante, p. 144.

[As in No. 73 to the (f),] that the said complainant, in and by his said bill, claims to be entitled to the lands, tenements and hereditaments therein particularly mentioned and described, and thereby stated to be now in the possession of this defendant; and the said complainant, by his said bill prays that he may be at liberty to examine, perpetuate, and preserve the testimony of certain persons therein named, as to his title thereto; yet the said complainant has not stated, nor does it appear in and by his said bill, that any action [\*VOL. II, 587] at law has hitherto been brought to \*establish his right, or that there was or is, any impediment to any such action being brought by the said complainant, or that the said several persons sought to be examined as witnesses, or any or either of them, are or is resident abroad, or now absent or about to depart from this state; nor hath the said complainant, by averment in, or affidavit annexed to the said bill, made oath that the said several persons sought to be examined, or any or either of them, are or is sick, or old, or infirm, or any other circumstance which renders such testimony in danger of being lost. Wherefore [*conclude as in No. 73.*]

## BOOK V.

### PROCEEDINGS IN SPECIAL CASES.

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#### CHAPTER I.

##### SUITS BY JUDGMENT CREDITORS.

No. 352.

*Creditor's bill.*

See ante, p. 163.

IN CHANCERY.

To the Chancellor of the State of New York.

Complaining, shows unto your honor, your orator A. B., of, etc.; that your orator heretofore, to wit, in the term of July, one thousand eight hundred and forty-two, in the supreme court of judicature of the state of New York, recovered against C. D., defendant in this suit, the sum of five hundred and fifty dollars and fifty cents, for the damages which your orator had sustained as well by reason of the not performing certain promises and undertakings made by the said defendant as for the costs and charges of your orator by him about his suit in that behalf expended, [*or a certain debt of five hundred dollars, and also fifty dollars and fifty cents for the damages which your orator had sustained as well by reason of the detaining the said debt as for his costs and charges by him about his suit in that behalf expended.*]

And your orator further shows unto your honor, that on the first day [\*Vol. II, 588] \*of October, one thousand eight hundred and forty-two, for the purpose of obtaining satisfaction of the said judgment, he sued and prosecuted out of the said supreme court of judicature, a writ of the people, called a [*testatum*] fieri facias, directed to the sheriff

of the county of Oneida, that being the county in which said defendant resided at the time of the issuing of said writ; by which said writ, the said sheriff was commanded that of the goods and chattels of the said defendant, within his bailiwick, he should cause to be made the said sum of five hundred and fifty dollars and fifty cents, which your orator in the said supreme court of judicature so recovered against the said defendant; and if sufficient goods and chattels of the said defendant could not be found in his bailiwick, that then and in that case, he should cause the [*debt and*] damages aforesaid to be made of the lands and tenements, real estate and chattels real whereof the said defendant was seized on the said tenth day of July, one thousand eight hundred and forty-two, on which day the said judgment was docketed in the clerk's office of the said county, or at any time afterwards, in whose ever hands the same might be. And that he should have those moneys before the said justices of the said supreme court, sixty days after the receipt of said writ by him, the said sheriff, to render unto your orator for the [*debt and*] damages aforesaid, and that he should have then and there that writ.

And your orator farther shows unto your honor that the said writ of [*testatum*] fieri facias, before the delivery thereof to the said sheriff of the said county of Oneida, as hereinafter mentioned, was duly indorsed with a direction for the said sheriff to levy for five hundred and fifty dollars and fifty cents, with interest from the said tenth day of July, one thousand eight hundred and forty-two, besides sheriff's fees, and was delivered to the said sheriff of the county of Oneida, to be executed in due form of law, on the day of the issuing thereof as aforesaid.

And your orator further shows unto your honor, that the said sheriff of the county of Oneida, at or after the expiration of the time therein limited for the return of the said writ of fieri facias, returned to the said writ, that the said defendant had no goods or chattels, lands or tenements, real estate or chattels real, in his bailiwick, whereon to levy and satisfy the same, or any part thereof; as by the said writ and the return of the said sheriff indorsed thereon, and now on file in the office of the clerk of the supreme court, in the city of Utica, more fully appears and to which your orator prays leave to refer, should it be necessary so to do. The above facts as to obtaining said judgment, and the proceedings thereon, your orator states upon the information of his said attorney, and he believes the same to be true.

\* And your orator farther shows unto your honor, [\*VOL. II, 589]

that he believes and charges that there is now actually and equitably due to your orator upon the aforesaid judgment the sum of five hundred and fifty dollars and fifty cents, together with the interest thereon from the tenth day of July, one thousand eight hundred and forty-two, over and above all claims of the said defendant against the same by way of offset or otherwise.

And your orator further shows unto your honor, that at the time of the recovery of the judgment above mentioned, against the said C. D., he, the said C. D., was and for several years previous thereto had been engaged in mercantile business at the city of Utica aforesaid; and that your orator is informed and believes that in the course of the said mercantile business of the said defendant, divers persons became indebted to him to a large amount, and that the said defendant has, at the time of filing this your orator's bill of complaint, debts due to him, and for which he holds divers securities and evidences to a large amount, and has divers goods, wares and merchandise, or other articles of personal property, which belong to him, or in which he is in some way or manner beneficially interested, and that he has equitable interests and things in action of some nature or kind, which might and ought to be applied to the payment of your orator's said judgment against him the said defendant.

And your orator also charges that the said defendant is the owner of or in some way or manner beneficially interested in, some real estate, in this or some other state, or some chattels real of some name or kind, or some contract or agreement relating to real estate, or the rents, issues and profits of some real estate; and also that the said defendant is the owner of or in some way beneficially interested in the stock of some company, incorporated or unincorporated, or in the profits of some company or copartnership; and also that he has in his possession, at the time of the filing of this your orator's bill of complaint, some money in coin or bank bills; or that he has money deposited in some bank or elsewhere, to his credit; or that he has money, or securities for the payment of money, held by some other person in trust or otherwise for his benefit.

And if the said defendant has made any assignment or transfer of his property or effects, or any part thereof, your orator expressly charges that he believes such assignment or transfer is merely colorable, and made with a view of protecting the property or effects of the said defendant so assigned, and placing the same beyond the reach of your orator's said judgment, and enabling the said defendant to control and



enjoy the same, and the avails thereof; and that so it would appear, if [\*VOL. II, 590] \*the said defendant would state and set forth when and to whom such transfer or assignment was made, and what was the amount in value, of the property or effects so assigned or transferred, and what were the terms upon which such transfer or assignment was made, and what disposition has been made of the property or effects so assigned or transferred, and in whose possession the same now is, or what has been done with the avails thereof. And your orator claims a full and complete discovery of all such property, effects and things in action, belonging to the said defendant, and of all trusts whereby any property, debts or other effects are held for the use or benefit of the said defendant, and of every assignment or transfer which the said defendant has made of his property, debts or other effects, and of the person or persons to whom such assignment or transfer has been made, the amount and value of the property, debts or other effects so assigned or transferred, and the trusts or other conditions upon which such assignment or transfer was made, and all the facts and circumstances relating thereto; and particularly what is the situation of the property, debts or other effects assigned or transferred, at the time of filing this your orator's bill of complaint.

And your orator farther shows unto your honor, that he has reason to believe, and does believe that the said defendant has property, debts, and other equitable interests, things in action, or effects, of the value of more than one hundred dollars, exclusive of all prior just claims thereon, and which your orator has been unable to reach by execution on said judgment against the said defendant, and that this your orator's bill of complaint is not exhibited by collusion with the said defendant or with any other person, or for the purpose of protecting the property or effects of the said defendant against the claims of other creditors, but for the sole and only purpose of compelling payment and satisfaction of the judgment so as aforesaid recovered by your orator against the said defendant.

And your orator well hoped, that the said defendant would have paid to your orator the amount due to him, on his said judgment, or would have applied for that purpose any property, money, debts, or other equitable interests or things in action belonging to him, or in which he is in any way interested, as in equity and good conscience he ought to have done.

But now so it is, may it please your honor, that the said defendant, combining and confederating with divers other persons, to your

orator unknown, but whose names, when discovered, he prays may be inserted herein, with proper and apt words to charge them, and contriving how to injure and defraud your orator in the premises, neglects or refuses to pay the amount so due to your orator on [\*VOL. II, 591] his said \*judgment, or to apply for that purpose any property, money, debts, or other equitable interests or things in action, belonging to the said defendant; and for reason whereof the said defendant sets up a variety of unfounded pretences. All which actings, doings, neglects and pretences, are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises. In tender consideration thereof, and forasmuch as your orator is remediless in the premises, at and by the direct and strict rules of the common law, and cannot have adequate relief, save in a court of equity, where matters of this and a similar nature are properly cognizable and relievable. To the end therefore, that the said defendant and his confederates when discovered, may upon oath, true, direct and perfect answer make, to all and singular the matters and things herein before stated and charged, as fully and particularly, as if the same were here again repeated and he thereto distinctly interrogated paragraph by paragraph, and especially that he may fully set forth and discover, according to the best of his knowledge and remembrance, information and belief, the nature and situation, amount and value of all the property, interests, and effects, of the said defendant, including all things in action, of whatever nature or kind, with all the particulars relating thereto, and that he may answer and state whether at the time of filing this your orator's bill of complaint, he, the said defendant, has not debts due to him to a considerable amount; and if so, that he may state particularly the amount of such debts respectively, and from whom the same are due, and what securities are held therefor, and also that he may state which and what amount of said debts are good and collectable, and what amount bad or doubtful; and whether at the time of filing this your orator's bill of complaint, he has not some property, real or personal, in law or equity, belonging to him or held in trust for him, or in which he has some beneficial interest of some kind or description, and if so, that he may state and set forth a full, true, and particular account thereof, and the nature and value of his interest therein; and that he may also state whether he has not money of some kind in his possession, or under his control, or deposited to his credit, or for his use, or in some way or manner held for his benefit, and if so, that he may state and set forth

particularly the amount thereof, and how and by whom the same is held; and that he may also state whether he has any other equitable interests or things in action, or other means belonging to him, or in which he is in any way interested, whereby he could pay any part of the amount so as aforesaid due to your orator upon his said judgment against him, the said defendant.

And if the said defendant has made any assignment or transfer of [\*VOL. II, 592] his \*property and effects, or any part thereof, that then he may state and set forth generally, but not in items, what property or effects have been so assigned or transferred, and the value thereof, and particularly when, and to whom, and for what purpose, and upon what terms and conditions, such assignment or transfer was made, and what has been done under such assignment or transfer, and what has been done with the property or effects so assigned or transferred, and the avails thereof.

And that the said defendant may be decreed to pay your orator the amount so as aforesaid due to him for principal and interest on his said judgment, together with your orator's costs and charges in this behalf sustained; and may be decreed to apply for that purpose, any money or property real or personal, in law or equity, debts, choses in action or equitable interests belonging to him, or held in trust for him, or in which he is in any way or manner beneficially interested; and that the said defendant may be enjoined and restrained from selling, assigning, transferring, delivering, negotiating, discharging, receiving, collecting, incumbering, or in any way or manner disposing of, or intermeddling with, any debts or demands due to him, or any bills, bonds, notes, drafts, checks, book-accounts, mortgages, judgments, or other debts due to him, whether in his possession or held by some other person in trust for him, or to his use or benefit; and also from assigning, transferring, or in any manner incumbering or disposing of, or intermeddling with, any money in coin, bank bills, drafts or checks belonging to him, whether in his possession, or held by any other person in trust for his use or benefit, or any stock, or interest in any private or incorporated company, or any property real or personal, things in action or chattels real, held by him, or by any other person for him, or in which he has any interest whatever, except where such trust has been created by, or the fund so held in trust has proceeded from some person other than the said defendant. And that the said defendant may also be in like manner prohibited from making any assignment of his property, and from confessing any judgment for the

purpose of giving preference to any other creditor over your orator, and from doing any other act to enable other creditors to obtain his property. And that a receiver may be appointed, according to the course of practice in this court, and with the usual powers of receivers in like cases, of all the property, equitable interests, things in action, and effects of the said defendant. And that your orator may have such further, or such other relief in the premises, as the nature of his case shall require, and as shall be agreeable to equity and good conscience.

May it please your honor to grant unto your orator the people's writ of injunction, issuing out of and under the seal of this honorable court, [\*VOL. II, 593] \*to be directed to the said C. D. and to his counselors, attorneys, solicitors, trustees and agents, therein and thereby commanding and strictly enjoining the said defendant, and the persons before mentioned; in manner aforesaid.

And may it also please your honor to grant unto your orator the people's writ of subpoena, issuing out of and under the seal of this honorable court, to be directed to the said C. D., therein and thereby commanding him, on a certain day, and under a certain penalty, to be therein inserted, that he personally be and appear before the [*vice*] chancellor [*of the 5th circuit*] in this honorable court, then and there to answer the premises, and to stand to, abide by and perform such order and decree therein, as to this court shall seem proper, and as shall be agreeable to equity and good conscience.(a)

P. G., Sol. for comp't.

J. H., of counsel for comp't.

A. B.

STATE OF NEW YORK, }  
*Oneida county,* } ss.

On this tenth day of December, one thousand eight hundred and forty-three, personally came before me the above named A. B., the complainant in the foregoing bill of complaint by him subscribed, and being by me duly sworn, said, that he had read the said bill and knew the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated to be upon the information and belief of the complainant, and that as to those matters and things he believes it is true.

A. K., Justice of the peace.

(a) By the 190th Rule, as amended in 1844, creditors' bills cannot be taxed at more than thirty folios, where they are filed against the judgment debtors only and upon a single judgment. The above form has therefore been made as short as possible.

No. 353.

*Injunction on a creditor's bill.*

See ante, p. 168.

The people of the state of New York to C. D. and to your [L. s.] counsellors, attorneys, solicitors, trustees and agents, and to each and every of them, greeting: Whereas it hath been represented to us in our court of chancery, on the part of A. B. complainant, that he has lately exhibited his bill of complaint in our said court of chancery, before our [*vice*] chancellor [*of the fifth circuit,*] [\*VOL. II, 594] against you the said \*C. D., to be relieved touching the matters therein complained of. In which said bill it is stated, among other things, that you are combining and confederating with others to injure the said complainant touching the matters set forth in the said bill, and that your actings and doings in the premises are contrary to equity and good conscience. We, therefore, in consideration thereof, and of the particular matters in the said bill set forth, do strictly command you the said C. D. and the persons before mentioned, and each and every of you, under the penalty of ten thousand dollars, to be levied on your lands, goods and chattels, to our use, that you do absolutely desist and refrain from selling, assigning, transferring, delivering, negotiating, discharging, receiving, collecting, incumbering, or in any manner disposing of, or intermeddling with, any debts or demands due to you, or any bills, bonds, notes, drafts, checks, book-accounts, mortgages, judgments, or other debts due to you, the said C. D., whether in your possession or held by some other person in trust for you, or to your use or benefit. And also from assigning, transferring, or in any manner incumbering, or disposing of, or intermeddling with, any money in coin, bank bills, drafts or checks belonging to you, the said C. D., whether in your possession, or held by any other person for you, or for your use or benefit; or any stock or interest in any private or incorporated company, or any property, real or personal, things in action or chattels real held by you, or any other person for you, the said C. D., or in which you have any interest whatever, except where such trust has been created by, or the fund so held in trust has proceeded from some other person. And you are hereby prohibited from making any assignment of his property, or confessing a judgment to give any other creditor a preference over

said complainant, until the further order of our court of chancery in the premises.

Witness Reuben H. Walworth, chancellor of our said state, at the city of Albany, the tenth day of January, in the year of our Lord one thousand eight hundred and forty-four.

J. E., Solicitor.

J. M. D., Register, [*or clerk.*]

No. 354.

*Notice to be served with creditor's bill.*

See ante, p. 166, and Rule 191, (ed. of 1844.)

[*Title of cause.*]

Take notice that the following is a copy of the 191st rule of this court, and that if you neglect to appear in this cause within [\*VOL. II, 595] \*twenty days after the return day of the subpoena, all notices of proceedings against you in this suit will be served on you through the post office directed to your present place of residence; and that if you neglect to appear before the master to whom it may be referred to appoint a receiver in pursuance of a summons so served, to assign your property and to be examined in relation thereto, you will be liable to be punished for a contempt of the court.

Dated, etc.

Yours, etc.,

J. E., Solicitor for complainant.

To C. D., the above defendant.

[*Annex a copy of the rule.*]

No. 355.

*Consent of defendant, under Rule 191.*

See ante, p. 166.

[*Title of cause.*]

Sir: Take notice that the appearance of the above defendant has been entered, and he hereby consents that an order may be entered in this cause taking the bill as confessed against him,

for the appointment of a receiver, and for a reference to a master to take his examination, in conformity to the 191st rule of this court.

Dated, etc.

Yours, etc.,

W. H., Solicitor for C. D.,

To J. E., Esq.,

the above defendant.

Complainant's Solicitor.

No. 356.

*Order to take bill as confessed, decree, and order of reference to appoint a receiver, etc., under the 191st rule, (as amended in 1844.)*

See ante, pp. 166, 167.

[*Title of cause.*]

On reading and filing proof of the personal service of the subpoena upon the defendant in this cause, together with a copy of the 191st rule of this court, and that twenty days have elapsed since the return day of the subpoena, and that no notice of the defendant's appearance has been received by the complainant's solicitor, [*or on reading and filing the written consent of the defendant under the 191st rule of this court,*] and on motion of J. E. of counsel for the complainant, it is ordered that the [\*VOL. II, 596] \*bill of complaint filed in this cause be and the same is hereby taken as confessed by the said defendant; and it is further ordered, adjudged and decreed that the said complainant recover against the said defendant the sum of five hundred and fifty dollars and fifty cents, with interest thereon from the 10th day of October, 1842, together with the complainant's costs of this suit to be taxed; and that the receiver to be appointed in this suit, pay the amount of the said debt and costs out of the proceeds of the property of the defendant, to be assigned to him as hereafter mentioned, according to the equitable priority of the said complainant as between him and the complainants in other creditors' suits against the said defendant; and that the said receiver bring the residue of the proceeds of the said property into court, to abide the further order thereof. And it is further ordered, that it be referred to one of the masters of this court residing in the county of *Oneida*, to appoint some suitable person to be receiver of the property, equitable interests, things in action, and effects of the said defendant; and that such master take from such receiver the necessary and usual security for the performance of his trust, and

file the same in the proper office, and that upon the filing of the report of the master, and of such security, the receiver be vested with all his rights and powers as receiver, according to the rules and practice of this court. And it is further ordered that the said defendant appear before the said master and assign, transfer, and deliver over to such receiver, on oath, all his property, equitable interests, things in action, and effects, and all books, papers, and vouchers relating thereto; and that he appear before such master from time to time and produce such books and papers, and submit to such examination, as the master shall direct in relation to any matter which he might have been legally required to disclose, if he had answered the bill in this cause in the usual manner. And it is further ordered that the said complainant or the said receiver be at liberty to apply to the court from time to time for such further directions in the premises as may be necessary.

[If the order of reference is made previous to the final decree, omit those parts of the above which decree the payment of the money, etc.]

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No. 357.

*Assignment to receiver in creditor's suit.*

See No. 278, ante, p. 522.

[\*VOL. II, 597]

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\*No. 358.

*Bond of receiver in creditor's suit.*

See No. 280, ante, p. 525.

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No. 359.

*Master's report of appointment of receiver in creditor's suit.*

See No. 281, ante, p. 526.



## CHAPTER II.

## BILL FOR FORECLOSURE OF MORTGAGE AND SALE OF PREMISES.

No. 360.

*Bill of foreclosure by mortgagee.*

See ante, p. 177.

IN CHANCERY.

To the Chancellor of the State of New York.

Your orator A. B., of the town of Milton, in the county of Saratoga, complaining, shows unto this court, that on the tenth day of June, one thousand eight hundred and forty-one, C. D., of the town of Rome, in the county of Oneida, executed under his hand and seal and delivered to your orator a bond bearing date on that day, in the penal sum of one thousand dollars, with a condition thereunder written, in substance that if the obligor in the said bond, his executors or administrators, should pay or cause to be paid, to the obligee therein named, his executors, administrators or assigns, the sum of five hundred dollars on the first day of January, one thousand eight hundred and forty-two, with interest, then the said bond to be void, otherwise to be and remain in force, as by the said bond ready to be produced by your orator as this court shall direct, will more fully appear. And the said C. D., to secure the payment of the principal and interest mentioned in the condition of the said bond, did at the same time execute, under his hand and seal, and deliver to your orator, a mortgage bearing even date with the said bond and conditioned for the payment of the said [\*VOL. II, 598] sum of five hundred dollars \*with the interest thereon according to the condition of the said bond, by which the said mortgagor mortgaged unto your orator in fee, certain lands and real estate, a description of which, taken from said mortgage, is contained in the schedule hereto annexed, marked A. ; which mortgage was duly acknowledged, and was afterwards recorded as a mortgage in the office of the clerk of the county of Oneida, on the twentieth day of June,

one thousand eight hundred and forty-one, at ten o'clock in the forenoon in book W. of mortgages on page 560; as by the said mortgage, and the certificates of acknowledgment, and of the recording aforesaid indorsed thereon, and ready to be produced as this court shall direct, will more fully appear.

And your orator believes and states that the sum of five hundred dollars, with interest from the tenth day of June, one thousand eight hundred and forty-one, remains due and unpaid to your orator (\*) and that no proceedings at law have been had to recover the debt secured by the said bond and mortgage, or any part thereof.

And your orator believes and states that E. F. and G. H. have or claim some interest in the said mortgaged premises, or in some part thereof, as purchasers, mortgagees or otherwise, which interests, if any, have accrued subsequent to the lien of the mortgage of your orator, and are subject thereto.

Your orator therefore asks the aid of this court in the premises, and that the above named C. D., E. F. and G. H., the defendants in this suit may appear before the [*vice*] chancellor [*of the fifth circuit*] in the court of chancery and answer this your orator's bill, according to the rules and practice of the said court, without oath, their answers on oath being hereby waived, and that the usual decree may be made for the sale of the mortgaged premises aforesaid, and for the payment of the amount due to your orator for principal and interest upon the said bond and mortgage and his costs of this suit, and that the said defendants and all persons claiming under them subsequent to the commencement of this suit, and all other persons, although not parties to this suit, who have any liens by judgment or decree upon the mortgaged premises subsequent to the said mortgage of your orator, or any liens or claims thereon by or under any such subsequent judgment or decree, either as purchasers, incumbrancers or otherwise, may be barred and foreclosed of all equity of redemption in the said premises, and that your orator may have such further, or such other relief as the nature of the case may require, and as to this court, may seem proper and agreeable to equity.

J. E., Solicitor for complainant.

R. N., of counsel.

\*Schedule A. referred to in the preceding bill, being [\*VOL. II, 599] a description of the mortgaged premises as they are described in the mortgage therein referred to.

[*Insert description of premises, as contained in the mortgage.*]

## No. 361.

*Bill of foreclosure by assignee of mortgage.*

## IN CHANCERY.

To the Chancellor of the State of New York.

Your orator A. B., of the city of Troy, in the county of Rensselaer, complaining shows unto this court, that on the first day of January, one thousand eight hundred and forty, C. D., of the town of Grafton, in the county of Rensselaer, executed under his hand and seal and delivered to J. S., of Troy aforesaid, a bond bearing date on that day, in the penal sum of two thousand dollars, with a condition thereunder written, in substance, that if the obligor in the said bond, his executors or administrators, should pay, or cause to be paid, to the obligee therein named, his executors, administrators or assigns, the sum of one thousand dollars on the tenth day of February, one thousand eight hundred and forty-one, with interest, then the said bond to be void, otherwise to be and remain in force; as by the said bond ready to be produced by your orator, as this court shall direct, will more fully appear. And the said C. D., to secure the payment of the principal and interest mentioned in the condition of the said bond, did at the same time execute, under his hand and seal, and deliver to the said J. S. a mortgage bearing even date with the said bond, and conditioned for the payment of said sum of one thousand dollars, with the interest thereon according to the condition of the said bond, by which the said C. D. mortgaged unto said J. S. in fee, certain lands and real estate, a description of which, taken from said mortgage, is contained in the schedule hereunto annexed, marked A, which mortgage was duly acknowledged, and was afterwards recorded as a mortgage in the office of the clerk of the county of Rensselaer, on the fifth day of January, one thousand eight hundred and forty, at nine minutes after nine o'clock in the forenoon, in book V. of mortgages, on page 540, as by the said mortgage, and the certificates of acknowledgment and of the recording aforesaid indorsed thereon, and ready to be produced as this court shall direct, will more fully appear.

And your orator further states that the said bond and mortgage [\*VOL. II, 600] have \*been duly assigned to your orator for a valuable consideration, and are now held and owned by your orator.

And your orator believes and states that the sum of nine hundred dollars, with interest from the twentieth day of February, one thou-

sand eight hundred and-forty one, remains due and unpaid to your orator, and that no proceedings at law have been had to recover the debt secured by the said bond and mortgage, or any part thereof.

And your orator believes and states that E. F. and G. H., have or claim some interest in the said mortgaged premises, or in some part thereof, as purchasers, mortgagees, or otherwise, which interests, if any, have accrued subsequent to the lien of said mortgage, and are subject thereto.

Your orator therefore asks the aid of this court in the premises, and that the above named C. D., E. F. and G. H., the defendants in this suit, may appear before the [*vice*] chancellor [*of the third circuit,*] in the court of chancery, and answer this your orator's bill, according to the rules and practice of the said court, without oath, their answers on oath being hereby waived, and that the usual decree may be made for the sale of the mortgaged premises aforesaid, and for the payment of the amount due to your orator for principal and interest upon the said bond and mortgage, and his costs of this suit, and that the said defendants, and all persons claiming under them subsequent to the commencement of this suit, and all other persons, although not parties to this suit, who have any liens by judgment or decree upon the mortgaged premises subsequent to the said mortgage of your orator, or any liens or claims thereon by or under any such subsequent judgment or decree, either as purchasers, incumbrancers, or otherwise, may be barred and foreclosed of all equity of redemption in the said premises. And that your orator may have such further, or such other relief as the nature of the case may require, and as to this court, may seem proper and agreeable to equity.

J. E., Sol. for complainant.

R. M., of counsel.

Schedule A, referred to in the preceding bill, [*as in last form.*]

[\*VOL. II, 601]

\*No. 362.

*Notice of lis pendens, to file in county clerk's office, in foreclosure suits.*

See ante, p. 178, and Appendix to Rule No. 22, ed. of 1844.

IN CHANCERY.

A. B., complainant,	}	<i>[Insert names of all the parties at length.]</i>
v.		
C. D., defendant.		

Notice is hereby given, that a suit has been commenced in the court of chancery of the state of New York, upon a bill filed before the [*vice*] chancellor [*of the third circuit,*] by the above named complainant against the above named defendants, for the purpose of obtaining the foreclosure of a mortgage, bearing date on the first day of January, 1840, executed by C. D., then of the town of Grafton, in the county of Rensselaer, to the above complainant, [*or to one J. S.,*] and recorded in the office of the clerk of the county of Rensselaer, on the fifth day of January, 1840, at nine minutes after nine o'clock in the forenoon, in book V. of mortgages, on page 540, [*which mortgage has been duly assigned to the said A. B.*] And that the mortgaged premises to be affected by said foreclosure, were at the time of the commencement of this suit, and at the time of filing this notice are, situated in the town of Grafton, in the county of Rensselaer, [*or in the first ward of the city of Utica, in the county of Oneida; or in the village of C. in the county of G.,*] and are described in the said mortgage as follows, to wit: [*insert the description of the premises as contained in the mortgage.*]

Dated, etc.

J. E., Solicitor for complainant.

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 No. 363.
*Notice of object of suit.*

See ante, p. 179.

[*Title of cause.*]

You will please take notice that this suit is instituted for the purpose of obtaining the foreclosure of a mortgage bearing date the first

day of January, 1840, executed by C. D., then of the town of Grafton, in the county of Rensselaer, to the above complainant [*or to one J. S.,*] to secure the payment of the sum of one thousand dollars, with interest, [\*VOL. II, 602] and \*recorded in the office of the clerk of the county of Rensselaer, on the fifth day of January, 1840, at nine minutes after nine o'clock in the forenoon, in book V. of mortgages, on page 540, [*which mortgage has been duly assigned to the said A. B.*]

And you will also take notice that the above complainant makes no personal claim against any of the defendants in this suit, except the said mortgagor, C. D.

The following is a brief description of the premises embraced in said mortgage, and which are sought to be affected by this suit [*insert description.*]

Dated, etc.

Yours, etc.,

J. E., Solicitor for complainant.

To the above defendants.

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No. 364.

*Affidavit of filing notice of lis pendens in a foreclosure suit.*

See ante, p. 183.

[*Title of cause.*]

Saratoga County, ss. E. F., of the town of Ballston, in the county of Saratoga, being duly sworn saith, that he is [*the clerk of, or the law partner of*] the solicitor for the complainant in the above entitled cause, [*and is a counsellor in chancery*] that the bill in this cause was filed to foreclose a mortgage, and has not been taken as confessed against the defendants as absentees [*or has been taken as confessed against some of the defendants as absentees,*] and that no defendant has appeared in this cause so as to entitle him or her to a notice of the hearing therein, except John Peterson, who has appeared by his solicitor, and Peter Evans, an infant, who has appeared by Samuel Stiles, his guardian ad litem.

And this deponent further saith, that he knows, or has made the necessary inquiries to ascertain, the location of the premises described in said mortgage, and the town, incorporated village and county, or the ward and city and county in which said premises, and every part

thereof, were situated at the time of the commencement of this suit, and of the filing of the notice hereinafter mentioned, and also as to all the other particulars required to be stated in such notice, by the act entitled "An act to reduce the expense of foreclosing mortgages in the court of chancery," passed May 14th, 1840; and that more than forty days since, a notice of the pendency of this suit and of the object [\*VOL. II, 603] thereof in the \*form prescribed in said act, and containing, as this deponent believes, correctly and truly all the particulars required to be stated in such notice by the said act, was filed in the office of the clerk of the county in which the said mortgaged premises were then situated; and that since the filing of said notice the bill in this cause has not been amended by making a new party to the suit, or so as to affect other property not described in the original bill, or so as to extend the claims of the complainant against the mortgaged premises. And this deponent further saith, that the said notice contained the names of all of the complainants and of the defendants in this suit at the time of the filing of said notice, the date of said mortgage, and by whom and to whom the same was executed, the time when such mortgage was recorded, and a description of the mortgaged premises as contained in such mortgage, and showing the town, incorporated village and county, or the ward and city and county in which said mortgaged premises were situated at the time of the commencement of this suit, and of the filing of said notice.

Sworn to before me this tenth {  
day of January, 1844. }

E. F.

A. K., Justice of the Peace.

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No. 365.

*Certificate of clerk as to filing of notice of lis pendens.*

See ante, p. 183.

[To be added at the foot of the notice of lis pendens (No. 363).] I, R. W., clerk of the county of Rensselaer, do hereby certify that a notice, of which the above is a copy, was filed in the clerk's office of said county more than forty days since.

Dated, etc.

R. W.

## No. 366.

*Affidavit to be annexed to county clerk's certificate of filing notice of lis pendens in a foreclosure suit.*

[*Title of cause.*]

Rensselaer county ss. E. F., of the city of Troy, in the county of Rensselaer, being duly sworn, saith, that he is the [*clerk of, or the law partner of the*] solicitor for the complainant in the above [\*Vol. II, 604] \*entitled cause, [*and is a counsellor in chancery*] that the bill in this cause was filed to foreclose a mortgage, and has not been taken as confessed against any of the defendants as absentees, [*or has been taken as confessed against some of the defendants as absentees,*] and that no defendant has appeared in this cause, so as to entitle him or her to a notice of the hearing therein, except C. D., who has appeared by his solicitor, and G. H. an infant, who has appeared by J. S., his guardian ad litem. And this deponent further saith that he knows, or has made the necessary inquiries to ascertain the location of the premises described in said mortgage, and the town, incorporated village and county, or the ward and city and county in which said premises, and every part thereof, were situated at the time of the commencement of this suit, and of the filing of the notice, a certified copy of which is hereto annexed, and also as to all the other particulars required to be stated in such notice, by the act entitled "An act to reduce the expense of foreclosing mortgages in the court of chancery," passed May 14th, 1840, and that the particulars stated in the notice of which the annexed is a certified copy, are correctly and truly stated therein as they existed at the time of filing such notice, as required by said act of May 14th, 1840; and that since the filing of said notice the bill in this cause has not been amended by making a new party to the suit, or so as to affect other property not described in the original bill, or so as to extend the claims of the complainant against the mortgaged premises.

Sworn to before me this tenth }  
day of January, 1844. }

E. F.

J. A., Master in Chancery.



## No. 367.

*Order pro confesso, and reference, in foreclosure suit, all due, and absent defendants.*

See ante, pp. 180, 181.

At, etc. [as in No. 255.]

[*Title of cause.*]

The bill in this cause having been taken as confessed by the defendant E. F., after personal service of a subpoena on him, and the defendant C. D., who is a non-resident of this state, having been duly notified to appear according to law, and not having appeared in this cause, and the period limited by the notice hereinafter mentioned for his appearance having elapsed; on filing printed copies of [\*VOL. II, 605] said notice \*with affidavits of due publication thereof for the time and in the manner required by law and by the order of this court made in this cause; and on filing the affidavit of J. E., the complainant's solicitor, stating that said absent defendant has not appeared in this cause; and on motion of said solicitor it is ordered that said bill be taken as confessed by said absent defendant, and that it be referred to a master of this court, residing in the county of Rensselaer, to compute and ascertain the amount due to said complainant on the bond and mortgage mentioned in said bill; and to examine said complainant on oath as to any payments that may have been made to said complainant, or to any person for his use, on account of the demand mentioned in said bill, and which ought to be credited thereon; and to take proof of the facts and circumstances stated in said bill, and to report the amount so due, and also such proofs and examinations to this court with all convenient speed.

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 No. 368.

*Order pro confesso and reference in foreclosure suit, all due—no infants or absent defendants.*

See ante, p. 180.

At, etc. [as in No. 255.]

[*Title of cause.*]

On filing a subpoena in this cause to appear and answer, and proof of due personal service of the same on C. D. the defendant, and on

motion of J. E., complainant's solicitor, it is ordered that the bill filed in this cause be taken as confessed by said defendant for want of appearance; and that it be referred to a master of this court residing in the county of Saratoga, to compute and ascertain the amount due to the complainant for principal and interest on the bond and mortgage set forth in said bill, and report the same to this court.

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No. 369.

*Order of reference in foreclosure suit—part not due—infant defendants, but no absent defendants.*

See ante, pp. 180, 181.

At, etc. [*as in No. 255.*]

[*Title of cause.*]

The bill in this cause having been taken as confessed by the adult defendants, and the infant defendant having put in a gen- [\*VOL. II, 606] \*eral answer by his guardian ad litem; and it appearing by said bill that the same is filed to foreclose a mortgage, and that a part of the sum secured to be paid by said mortgage and the bond accompanying the same is not yet due; on motion of J. E., complainant's solicitor, it is ordered that it be referred to one of the masters of this court residing in the county of Saratoga, to compute, ascertain, and report the amount actually due to the complainant for principal and interest on said bond and mortgage, and also the amount secured to be paid thereby and which remains unpaid, including interest thereon to the date of his report; and also to take proof of the facts and circumstances stated in said bill and report the same to this court; and also to ascertain and report the situation of the said mortgaged premises, and whether the same can be sold in parcels without injury to the interests of the parties; and if he shall be of opinion that a sale of the said premises in one parcel will be most beneficial to the parties, then that he report his reasons for such opinion.

## No. 370.

*Order pro confesso and reference in foreclosure suit—part not due and absent defendants.*

See ante, pp. 180, 181.

At, etc. [*as in No. 255.*]

[*Title of cause.*]

The bill in this cause having been taken as confessed by the defendant C. D. after personal service of a subpœna on him, and the defendant E. F., who is a non-resident of this state, having been duly notified to appear according to law, and not having appeared in this cause, and the period limited by the notice hereinafter mentioned for his appearance having elapsed; on filing printed copies of said notice with affidavits of due publication thereof for the time and in the manner required by law and by the order of this court made in this cause; and on filing the affidavit of J. E., the complainant's solicitor, that said absent defendant has not appeared in this cause; and on motion of said solicitor, it is ordered that said bill be taken as confessed by said absent defendant; and it appearing by said bill that the same was filed to procure the foreclosure of a mortgage and a sale of the mortgaged premises therein described, and that a part of the debt secured by said mortgage and the bond accompanying the same is not yet due; it is further ordered that it be referred to one of the masters of [\*VOL. II, 607] this court, \*residing in the county of Erie to compute, ascertain and report the amount actually due to the complainant for principal and interest on said bond and mortgage, and also the amount secured to be paid thereby and which remains unpaid, including interest thereon to the date of his report; and also to take proof of the facts and circumstances stated in said bill, and to examine the complainant on oath, as to any payments that may have been made to said complainant, or to any person for his use, on account of the demand mentioned in said bill and which ought to be credited thereon; and also to ascertain and report the situation of said mortgaged premises, and whether in his opinion the same can be sold in parcels without injury to the interests of the parties; and if he shall be of opinion that a sale of said premises in one parcel will be most beneficial to the parties, then that he report his reasons for such opinion.

## No. 371.

*Order pro confesso and reference in foreclosure suit—part not due—no infants or absentees.*

See ante, p. 180.

At, etc. [*as in No. 255.*]

[*Title of cause.*]

On filing a subpoena to appear and answer in this cause, with proof of due personal service on all of the above defendants, and on motion of J. E., the complainant's solicitor, it is ordered that the bill filed in this cause be taken as confessed by said defendant for want of appearance; and it appearing by said bill that the same was filed to procure the foreclosure of a mortgage and a sale of the mortgaged premises therein described, and that a part of the debt secured by said mortgage and the bond accompanying the same is not yet due; it is farther ordered that it be referred to a master of this court residing in the county of Cayuga, to compute, ascertain and report the amount actually due to the complainant for principal and interest on said bond and mortgage; and also the amount secured to be paid by said bond and mortgage, and which remains unpaid, including interest thereon to the date of his report; and also to ascertain and report the situation of the mortgaged premises, and whether in his opinion the same can be sold in parcels without injury to the interests of the parties; and if he shall be of opinion that a sale of the said premises in one parcel will be most beneficial to the parties, that he then report his reasons for such opinion.

[\*VOL. II, 608]

\*No. 372.

*Order of reference in foreclosure suit, all due—infant defendants, but no absent defendants.*

See ante, pp. 180, 181.

At, etc. [*as in No. 255.*]

[*Title of cause.*]

The bill in this cause having been taken as confessed by the adult defendant and the infant defendants having put in a general answer

by their guardian ad litem; on motion of J. E., complainant's solicitor, it is ordered that it be referred to a master in this court residing in the county of Saratoga, to take proof of the material facts stated in said bill and report the same to this court; and also to compute and ascertain the amount due to the complainant for principal and interest on the bond and mortgage set forth in said bill, and report the same to this court.

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No. 373.

*Affidavit of merits in foreclosure suit.*

See ante, p. 182.

[*Title of cause.*]

Saratoga county, ss. C. D., the above defendant, being duly sworn deposes and saith that this suit is brought to foreclose a mortgage alleged to have been executed by this deponent; and this deponent has put in his answer to the complainant's bill; that he has a good and meritorious defense to the said suit, and that his answer was not put in for the purpose of delay.

And further saith not.

C. D.

Sworn, etc.

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No. 374.

*Master's report of amount due on bond and mortgage—on bill taken as confessed—all due.*

See ante, p. 183.

[*Title of cause.*]

To the Chancellor of the State of New York

In pursuance and in virtue of an order of this court, made in the [\*Vol. II, 609] \*above cause, and bearing date the — day of —, in the year one thousand eight hundred and forty—, by which it was referred to one of the masters of this court, to compute, ascertain and report the amount due to the complainant for principal and interest on the bond and mortgage mentioned and set forth in his bill of complaint, filed in this cause, (\*) [*if any of the defendants are absent*

tees, add: and to examine the complainant on oath as to any payments made on account thereof, and to take proof of the facts and circumstances stated in the said bill (†),] and report thereon to this court, with all convenient speed: I, the subscriber, one of the masters of this court, residing in the county of Saratoga, do respectfully certify and report, that I have computed and ascertained the amount due to the complainant in this cause as aforesaid, and that the amount so due on the said bond and mortgage, for the principal and interest up to and including the date of this report, is the sum of — dollars.

And I do farther certify and report, that the schedule hereunto annexed, marked A, and making a part of this my report, contains a statement and account of the principal and interest moneys due to the complainant as aforesaid, the period of the computation of the interest and its rate, and to which, for greater certainty, I refer. [*If any of the defendants are absentees, add: And I further certify and report, that I have examined the complainant, on oath, as to any payments on account of the said bond and mortgage, and have taken proof of the facts and circumstances stated in the complainant's bill; and I find the several matters stated in the said bill to be true. And I further certify that the schedule B, hereto annexed, and making a part of this my report, contains the substance of the examination and proofs had before me, except so much of said proof as is documentary, and of that an abstract is herewith returned.*]

All which is respectfully submitted.

P. G. E., Master in chancery.

Dated Jan'y 10th, 1844.

*Schedule marked A, referred to in the preceding report.*

One bond, dated June 10th, 1841, in the penal sum of \$1,000, conditioned to pay \$500, as follows, viz: on the first day of January, 1842, with interest; which bond is accompanied by a mortgage of the same date.

[*VOL. II, 610] *Principal sum due.....	\$500 00
Interest thereon from June 10th, 1841, to January 10th, 1844, being 2 years and 7 months, at seven per centum per annum, is.....	89 00

Amount due complainant this 10th day of Jan'y, 1844, is.... \$589 00

P. G. E., Master in Chancery.

[*If any of the defendants are absentees, add schedule B, containing the examination and proofs.*]

## No. 375.

*Master's report of amount due and secured and unpaid on bond and mortgage—not all due—and absent defendant.*

See ante, p. 183.

[*As in last form to the* (†) *then,*] and also to ascertain and report the situation of the mortgaged premises, and whether in his opinion the same can be sold in parcels, without injury to the interests of the parties; and if he shall be of opinion that a sale of the said premises in one parcel will be most beneficial to the parties, then that he report his reasons for such opinion, and that he report thereon to this court, with all convenient speed: I, the subscriber, one of the masters of this court, residing in the county of Saratoga, do respectfully certify and report, that I have computed and ascertained the amount due to the complainant in this cause as aforesaid, and that the amount so due on the said bond and mortgage for the principal and interest, up to and including the date of this report, is the sum of ——— dollars.

And I do farther certify and report, that the schedule hereto annexed, marked A, and making part of this my report, contains a statement and account of the principal and interest moneys due to the complainant as aforesaid, the period of the computation of the interest, and its rate, and to which, for greater certainty, I refer.

And I do farther certify and report, that I have computed and ascertained the amount secured to be paid by said bond and mortgage, and which remains unpaid, including interest thereon to the date of this my report, and the same is the sum of ——— dollars.

Schedule marked B, to this my report annexed, and forming a part thereof, contains a statement of the said principal and interest moneys respectively, the period of the computation of the interest, and its rate; and to which, for greater certainty, I refer.

\*And I do farther certify and report, that I have [\*VOL. II, 611] taken proof of the facts and circumstances stated in said bill of complaint, and have examined the complainant A. B., on oath as to any payments which may have been made to him or to any person for his use, on account of the demand mentioned in said bill, and which ought to be credited thereon; and such proofs, except those which are documentary, and such examinations, are to this my report annexed: and I am of opinion that the facts and circumstances stated in said bill are true.

And I do farther certify and report, that I have ascertained the

situation of said mortgaged premises, and am of opinion the same can [not] be sold in parcels without injury to the interests of the parties, [for the reason that the mortgaged premises consist of a house and lot in the city of Troy, which cannot well be divided.]

All which is respectfully submitted.

P. G. E., Master in Chancery.

Dated Jan'y 10th, 1844.

*Schedule marked A. referred to in the preceding report.*

One bond, dated January 1, 1840, in the penal sum of \$4,000, conditioned to pay \$1,000 as follows, viz.: \$1,000 in one year from date, with interest, and \$1,000 in five years from date, with interest, which bond is accompanied by a mortgage of the same date.

Principal sum due.....	\$1,000 00
Interest thereon from January 1st, 1840, to January 10th, 1844, being four years and ten days, at seven per centum per annum, is.....	281 92

Amount due complainant this 10th day of Jan'y, 1844, is... \$1,281 92

P. G. E., Master in chancery.

*Schedule marked B. referred to in the preceding report.*

Same bond and mortgage mentioned in schedule A.

Principal sum secured and unpaid.....	\$2,000 00
Interest thereon from the first day of January, 1840, to the tenth day of January, 1844, being four years and ten days, is .....	563 84

Whole amount secured and unpaid, including interest thereon to this day, is..... \$2,563 84

Dated Jan'y 10th, 1844.

P. G. E., Master in chancery.

[\*VOL. II, 612]

\*No. 376.

*Master's report of amount due and secured and unpaid on bond and mortgage—not all due and no absent defendant.*

See ante, p. 183.

[As in No. 374 to the (\*), then] and also to compute and ascertain the amount secured to be paid by said bond and mortgage, and which



remains unpaid, including interest thereon to the date of his report; and also to ascertain and report the situation of the mortgaged premises, and whether in his opinion the same can be sold in parcels, without injury to the interests of the parties; and if he shall be of opinion that a sale of the said premises in one parcel will be most beneficial to the parties, then that he report his reasons for such opinion, and that he report thereon to this court, with all convenient speed: I, the subscriber, one of the masters of this court, residing in the county of Saratoga, do respectfully certify and report, that I have computed and ascertained the amount due to the complainant in this cause as aforesaid, and that the amount so due on the said bond and mortgage for the principal and interest, up to and including the date of this report, is the sum of — dollars.

And I do farther certify and report, that the schedule hereto annexed, marked A., and making a part of this my report, contains a statement and account of the principal and interest moneys due to the complainant as aforesaid, the period of the computation of the interest and its rate, and to which, for greater certainty, I refer.

And I do farther certify and report, that I have computed and ascertained the amount secured to be paid by said bond and mortgage, and which remains unpaid, including interest thereon to the date of this my report, and the same is the sum of — dollars.

Schedule marked B., to this my report annexed, and forming a part thereof, contains a statement of the said principal and interest moneys respectively, the period of the computation of the interest, and its rate; and to which, for greater certainty, I refer.

And I do farther certify and report, that I have ascertained the situation of said mortgaged premises, and am of opinion that the same can [not] be sold in parcels without injury to the interests of the parties, [*for the reason, etc. as in No. 375.*]

All which is respectfully submitted.

P. G. E., Master in chancery.

Dated January 5th, 1844.

*\*Schedule marked A., referred to in the preceding report. [\*VOL. II, 613]  
[same as to No. 375.]*

*Schedule marked B., referred to in the preceding report.  
[same as to No. 375.]*

## No. 377.

*Decree for sale in foreclosure suit.*

See ante, p. 183.

At a court [*as in No. 255.*][*Title of cause.*]

This cause having been this day brought on to be heard, upon the bill of complaint filed therein, taken as confessed by all the defendants, and upon the report of P. G. E., one of the masters of this court, which report bears date the 10th day of January instant, and was made in pursuance of an order of this court, heretofore made in this cause, referring it to one of the masters of this court, to compute the amount(\*) due to the complainant on the bond and mortgage mentioned and set forth in said bill of complaint.(f)

On reading and filing said report, from which it appears that there was due to the said complainant at the date of said report, for said principal and interest, the sum of — dollars, and on reading and filing the affidavit of J. E., the complainant's solicitor, made in pursuance of the requisitions of the 134th rule of this court, and showing the facts therein required to be shown by affidavit, or by the certificate of the clerk of the county where said mortgaged premises are situated, or otherwise; and on motion of Mr. W. C. N., of counsel for the complainant, it is ordered, adjudged and decreed, and this court by virtue of the authority therein vested, doth order, adjudge and decree, that the said report, and all things therein contained, do stand ratified and confirmed. And it is farther ordered, adjudged and decreed, that all and singular the said mortgaged premises mentioned in the bill of complaint in this cause, and hereinafter described, or so much thereof as may be sufficient to raise the amount due to the complainant for the principal, interest and costs in this case, and which may be sold separately without material injury to the parties interested, be sold at public auction, by or under the direction of one of the masters of this court; that the said sale be made in the county where the said mortgaged premises, or the greater part thereof, are situated; that the [\*VOL. II, 614] master give public notice of the \*time and place of such sale, according to the course and practice of this court, and that the complainant, or any of the parties in this cause, may become the purchaser; that the master execute a deed to the purchaser or purchasers of the mortgaged premises on the said sale; and that the said master, out of the proceeds of said sale, retain his fees, disbursements

and commissions on said sale, and pay to the complainant or his solicitor, out of said proceeds his costs in this suit to be taxed, and also the amount so reported due as aforesaid, together with legal interest thereon, from the date of said report, or so much thereof as the purchase money of the mortgaged premises will pay of the same; and that the master take receipts for the amount so paid, and file the same with his report, and that he bring the surplus moneys arising from said sale, if any there be, into court, without delay, to abide the farther order of this court. And it is farther ordered, adjudged and decreed, that the defendants and all persons claiming or to claim from or under them, and all persons having a lien subsequent to such mortgage, by judgment or decree, upon the land contained in said mortgage, and his or their heirs and personal representatives, and all persons having any lien or claim by or under such subsequent judgment or decree, and their heirs and personal representatives, and all persons claiming under them, be forever barred and foreclosed, of and from all equity of redemption, and claim, of, in, and to said mortgaged premises, and every part and parcel thereof. And it is farther ordered, that the purchaser or purchasers of said mortgaged premises at such sale, be let into possession thereof; and that any of the parties in this cause, who may be in possession of said premises or any part thereof, and any person who, since the commencement of this suit, has come into possession under them or either of them, deliver possession thereof, to such purchaser or purchasers, on production of the master's deed for such premises, and a certified copy of the order confirming the report of such sale, after such order has become absolute. And it is farther ordered and decreed, that if the moneys arising from the said sale shall be insufficient to pay the amount so reported due to the complainant with the interest and costs and expenses of sale as aforesaid, such master specify the amount of such deficiency in his report of said sale; and that on the coming in and confirmation of said report, the defendant C. D., who is personally liable for the payment of the debt secured by the said mortgage, pay to the complainant the amount of such deficiency, with interest thereon, from the date of such last mentioned report, and that the complainant have execution therefor. The description and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to, or from the bill of complaint in this cause, are as follows, viz.: [*insert description of mortgaged premises.*]

## No. 378.

*Decree for sale in foreclosure of suit, where a part only of debt is due, and premises cannot be sold in parcels.*

See ante, p. 183.

[As in last form to the (†) then proceed] according to the condition of said bond; and also the amount secured or intended so to be by said bond and mortgage, and remaining unpaid, with interest thereon to the date of such report; and also to ascertain the situation of said mortgaged premises and report whether the same are so situated that they can be sold in parcels without injury to the interests of the parties; and if he shall be of opinion that they cannot be sold in parcels without injury to the interests of the parties, then that he report his reasons for such opinion.

On reading and filing said report, from which it appears that there was actually due to the said complainant at the date of said report, for said principal and interest, the sum of — dollars and cents; and that the amount secured by and unpaid upon said bond and mortgage, including interest thereon to the date of said report, is the sum of — dollars and — cents; and that said premises are so situated that they cannot be sold in parcels without injury to the interests of the parties for the reasons set forth in said report, and on reading and filing the affidavit of J. E., the complainant's solicitor, made in pursuance of the requisitions of the 134th rule of this court, and showing the facts therein required to be shown by affidavit, or by the certificate of the clerk of the county where said mortgaged premises are situated, or otherwise; and on motion of Mr. W. C. N., of counsel for the complainant, it is ordered, adjudged and decreed, and this court, by virtue of the authority therein vested, doth order, adjudge and decree, that the said report, and all things therein contained, do stand ratified and confirmed. And it is further ordered, adjudged and decreed, that all and singular of the said mortgaged premises mentioned in the bill of complaint in this cause, and hereinafter described, be sold at public auction, by or under the direction of one of the masters of this court; unless previous to such sale said defendant pay to said complainant, or his solicitor, or to said master, the amount reported as actually due [\*VOL. II, 616] upon said bond and \*mortgage, with interest thereon from the date of said report, and the complainant's costs of this suit and the costs of said sale up to the time of such payment; that the said sale

be made in the county where the said mortgaged premises are situated; that the master give public notice of the time and place of such sale, according to the course and practice of this court, and that the complainant, or any of the parties in this cause, may become the purchaser; that the master execute a deed to the purchaser, or purchasers, of the mortgaged premises on the said sale; and that the said master, out of the proceeds of said sale, retain his fees, disbursements and commissions on said sale, and pay to the complainant or his solicitor, out of said proceeds his costs in this suit to be taxed, and also the amount so reported as secured and unpaid as aforesaid, together with legal interest thereon, from the date of said report, or so much thereof as the purchase money of the mortgaged premises will pay of the same; and that the master take receipts for the amounts so paid, and file the same with his report; and that he bring the surplus moneys arising from said sale, if any there shall be, into court without delay, to abide the further order of this court. And it is further ordered, adjudged and decreed, that the defendant and all persons claiming or to claim from or under him, and all persons having a lien subsequent to such mortgage, by judgment or decree, upon the land contained in said mortgage, and his or their heirs and personal representatives, and all persons having any lien or claim by or under such subsequent judgment or decree, and their heirs and personal representatives, and all persons claiming under them, be forever barred and foreclosed, of and from all equity of redemption, and claim, of, in, and to said mortgaged premises, and every part and parcel thereof. And it is further ordered, that the purchaser or purchasers of said mortgaged premises at such sale, be let into possession thereof; and that any of the parties in this cause, who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this suit, has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers, on production of the master's deed for such premises, and a certified copy of the order confirming the report of such sale, after such order has become absolute. And it is further ordered and decreed, that if the moneys arising from said sale shall be insufficient to pay the amount so reported as actually due to the complainant with the interest and costs and expenses of sale as aforesaid, that said master specify the amount of such deficiency in his report of said sale; and that, on the coming in and confirmation of said report, the defendant C. D., who is personally liable for the payment of the [\*VOL. II, 617] \*debt secured by the said mortgage, pay to the com-

plainant the amount of such deficiency, which is then due and payable, with interest thereon, from the date of such last mentioned report, and that the complainant have execution therefor. And in case the amount reported as actually due, with interest and the costs of this suit, shall be paid before such sale, it is further ordered that said complainant be at liberty, at any time hereafter when any principal sum or interest secured by said bond and mortgage shall become due, according to the condition of said bond, to go before a master on the foot of this decree and procure a report of the amount which shall then be due thereon, to the end that upon the coming in and confirmation of such report a decree may be made for a sale of said premises to satisfy the amount which shall then be due, with interest, and the costs of such report and sale. And in case said premises shall be sold under this decree, and shall not produce sufficient to satisfy the amount so reported as secured and unpaid, with interest and the costs of this suit and of such sale, it is then further ordered that the said complainant be at liberty at any time thereafter when any such deficiency of principal or interest shall have become due according to the condition of said bond, to apply to this court for an execution against said defendant C. D., who is personally liable for the payment of the debt secured by the said mortgage, to collect the amount which shall be then due thereon. The description and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to, or from the bill of complaint in this cause, are as follows, viz. : [*insert description of mortgaged premises.*]

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No. 379.

*Decree for sale in foreclosure suit, where a part of debt is not due, and premises can be sold in parcels.*

See ante, p. 183.

[*As in No. 377 to the (\*) then proceed,*] actually due to the complainant on the bond and mortgage mentioned and set forth in said bill of complaint; also the amount secured by and unpaid upon said bond and mortgage, with interest thereon to the date of such report; and also to ascertain the situation of said mortgaged premises, and whether

the same can be sold in parcels without injury to the interests of the parties; and if such master should be of opinion that the said premises [\*Vol. II, 618] cannot be \*sold in parcels without injury to the interests of the parties, then that he report his reasons for such opinion.

On reading and filing said report, from which it appears that there was actually due to the said complainant at the date of said report, for said principal and interest, the sum of — dollars and — cents; and that the amount secured by and unpaid upon said bond and mortgage, with interest thereon to the date of said report, is the sum of — dollars and — cents; and that said premises can be sold in parcels without injury to the interests of the parties, and on reading and filing the affidavit of J. E., the complainant's solicitor, made in pursuance of the requisitions of the 134th rule of this court, and showing the facts therein required to be shown by affidavit, or by the certificate of the clerk of the county where said mortgaged premises are situated, or otherwise; and on motion of Mr. W. C. N., of counsel for the complainant, it is ordered, adjudged and decreed, and this court, by virtue of the authority therein vested, doth order, adjudge and decree, that the said report, and all things therein contained, do stand ratified and confirmed. And it is further ordered, adjudged and decreed, that so much of the said mortgaged premises mentioned in the bill of complaint in this cause, and hereinafter described, as may be sufficient to raise the amount so reported as actually due to the complainant for the principal and interest, and the costs in this case, and which may be sold separately without material injury to the parties interested, be sold in parcels at public auction, by or under the direction of one of the masters of this court; that the said sale be made in the county where the said mortgaged premises are situated; that the master give public notice of the time and place of such sale, according to the course and practice of this court, and that the complainant, or any of the parties in this cause, may become the purchaser; that the master execute a deed to the purchaser or purchasers of the mortgaged premises on the said sale; and that the said master, out of the proceeds of said sale, retain his fees, disbursements and commissions on said sale, and pay to the complainant or his solicitor, out of said proceeds, his costs in this suit to be taxed, and also the amount so reported as actually due as aforesaid, together with legal interest thereon, from the date of said report, or so much thereof as the purchase money of the mortgaged premises will pay of the same; and that the master take receipts for the amounts so paid, and file the same with his report;

and that he bring the surplus moneys arising from said sale, if any there be, into court without delay, to abide the farther order of this court. And it is farther ordered, adjudged and decreed, that the defendants, and all persons claiming or to claim from or under them, and [\*VOL. II, 619] all \*persons having a lien subsequent to such mortgage, by judgment or decree, upon the land contained in said mortgage, and his or their heirs and personal representatives, and all persons having any lien or claim by or under such subsequent judgment or decree, and their heirs and personal representatives, and all persons claiming under them, be forever barred and foreclosed, of and from all equity of redemption and claim, of, in, and to so much of said mortgaged premises as shall be sold, and every part and parcel thereof. And it is further ordered, that the purchaser or purchasers of said mortgaged premises at such sale, be let into possession of such parts thereof as shall be purchased by them respectively; and that any of the parties in this cause, who may be in possession of said premises, or any part thereof, which shall be sold, and any person who, since the commencement of this suit, has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers, on production of the master's deed for such premises, and a certified copy of the order confirming the report of such sale, after such order has become absolute. And it is further ordered and decreed, that if the moneys arising from said sale of the whole of said premises shall be insufficient to pay the amount so reported as actually due to the complainant, with the interest and costs and expenses of sale as aforesaid, that said master specify the amount of such deficiency in his report of said sale; and that, on the coming in and confirmation of said report, the defendant C. D., who is personally liable for the payment of the debt secured by the said mortgage, pay to the complainant the amount of such deficiency, with interest thereon, from the date of such last mentioned report, and that the complainant have execution therefor. And it is farther ordered and decreed, that said complainant be at liberty, at any time hereafter, as any instalment of principal or interest shall become due on said bond and mortgage, to go before a master on the foot of this decree, and obtain a report of the amount which shall then be due, to the end that on the coming in and confirmation of such report, a decree may be made for a sale of the residue of said premises not sold under this decree, to satisfy the amount which shall then be due, with interest and the costs of such report and sale. And in case said premises shall all be sold under this decree, to satisfy the



amount now actually due, with interest and costs, it is then farther ordered, that the said complainant be at liberty at any time thereafter when any future instalment of principal or interest shall fall due upon said bond and mortgage, to apply to this court for an execution against said defendant C. D., who is personally liable for the payment of the debt secured by the said mortgage, for the amount which shall [\*VOL. II, 620] \*then be due, with interest and the costs of such application. The description and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to, or from the bill of complaint in this cause, are as follows, viz: [*insert description of mortgaged premises.*]

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No. 380.

*Master's report of sale of mortgaged premises.*

See No. 241, ante, p. 501.

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No. 381.

*Execution for deficiency, in a foreclosure suit.*

See ante, p. 185.

The People of the State of New York to the sheriff of the [L. s.] city and county of New York, greeting: Whereas, on the — day of — by a certain decree made in our court of chancery before our vice-chancellor of the fourth circuit, at, etc. in a certain cause depending in our said court, wherein A. B. is complainant, and C. D. and E. F. are defendants, it was, among other things, ordered, adjudged and decreed, that all and singular the mortgaged premises mentioned in the bill of complaint in said cause, or so much thereof as might be sufficient to raise the amount due to the said complainant, for the principal, interest and costs in the said case, and which might be sold separately without material injury to the parties interested, be sold at public auction by or under the direction of one

of the masters of this court; and that the master, out of the proceeds of said sale, retain his fees, disbursements, and commissions on said sale, and pay to the complainant or his solicitor his costs in such suit, to be taxed, and also the amount reported due to him upon his mortgage, together with legal interest thereon from the date of the master's report of computation in said cause, or so much thereof as the purchase money of the mortgaged premises would pay of the same; and that such master bring the surplus moneys arising from said sale, if any, into court: and that if the moneys arising from the said sale [\*VOL. II, 621] should be insufficient \*to pay the amount reported due to the complainant, with the interest, and costs, and expenses of such sale, that such master specify the amount of such deficiency in his report of said sale; and that on the coming in and confirmation of such report the defendant C. D., who is personally liable for the payment of the mortgage debt, should pay to the said complainant the amount of such deficiency, with interest thereon from the date of the last mentioned report, and that such complainant have execution therefor. And whereas, the said master has filed his report of said sale in the proper office, and the same has been duly confirmed, by an order of the said court of chancery, from which report it appears that the costs so decreed to be paid to the said complainant amount to \$—— as taxed, and that the amount of the deficiency upon the sale of the said mortgaged premises, over and above the sum for which the said premises were sold, is \$——. And whereas, the said C. D. has failed to comply with all and singular the matters required of him in and by the said decree and to pay the amount of the deficiency thus reported, with interest, or any part thereof, as we have been informed in our said court of chancery. Now, therefore, in order that full and speedy justice may be done in the premises, we command you, the said sheriff, that of the goods and chattels of the said C. D. in your bailiwick you cause to be made the sum of \$——, being the amount of the deficiency of the moneys arising from said sale to pay the amount reported due and decreed to be paid to the said complainant, with the interest and costs as aforesaid. And if sufficient goods and chattels of the said C. D. cannot be found in your bailiwick, that then you cause the said sum of \$—— so decreed to be paid as aforesaid, with interest from the —— day of ——(a) and costs, to be made of the lands and tenements and chattels real of the said C. D. whereof he

(a) If the decree directs the payment of interest, that fact should be stated in the recital of the decree in the execution, in all cases; and the ordering part of the execution should be made to conform to the decree in that respect.

was seized on the — day of —, or at any time since, in whosever hands the same may be; and have you those moneys before our said vice-chancellor of the fourth circuit, in our said court of chancery, on the — day of — next, wheresoever the said court shall then be, to render to the said A. B. according to the decree aforesaid. And have you then there this writ, and make and return a certificate, under your hand, of the manner in which you shall have executed the same.

Witness, etc.

E. C., Sol.

G. M. D., Clerk.

[\*VOL. II, 622]

*\*Sheriff's return.*

I certify that the within named defendant C. D. has no goods or chattels, lands or tenements, real estate, or chattels real within my bailiwick whereon I can levy to make the amount of the within mentioned moneys, as I am within directed, or any part thereof.

J. A., Sheriff.

## CHAPTER III.

## BILL FOR STRICT FORECLOSURE OF A MORTGAGE.

No. 382.

*Form of bill.*

See ante, p. 188.

[As in No. 360 to the (\*), then continue] upon the said bond and mortgage.

And your orator further showeth unto your honor, that he hath frequently and in a friendly manner, applied to the said C. D. and requested him to pay to your orator the said sum of \$—, with interest thereon, or to release his right and equity of redemption in the said mortgaged premises to your orator; and your orator hoped the said requests would have been complied with. But now so it is, may it please your honor, the said C. D. combining and confederating [*charge confederacy as in No. 1, ante, p. 354,*] has refused either to pay to your orator the said principal money and interest, or to release to him his right and equity of redemption of, in, and to, the said mortgaged premises; pretending that there is some incumbrance upon or affecting the said premises prior to your orator's said mortgage, but what is the particular nature thereof, or in whom the same is vested, he refuses to discover. Whereas your orator charges the contrary thereof to be true; but nevertheless the said C. D. persists in such refusal as aforesaid. And your orator further charges, that the said mortgaged premises are a scanty security for the repayment of what is due for principal and interest upon the said mortgage.

All which actings, doings, and pretences of the said confederates are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator.

In tender consideration whereof, and forasmuch as your orator is [\*VOL. II, 623] \*remediless in the premises, at and by the strict rules of the common law, and is only relievable in a court of equity, where matters of this nature are properly cognizable and relievable.

To the end therefore that the said C. D. and his confederates when discovered, may, upon his and their several and respective corporal oaths, full, true, direct, and perfect answers make, according to the best of their respective knowledge, information and belief, to all and singular the premises; and that the said C. D. may discover and in manner aforesaid set forth whether there is or are any other, and what incumbrance or incumbrances, upon or affecting the said mortgaged premises, and if so, in whom the same is or are vested; and whether the same is or are not subsequent to your orator's said mortgage, or how otherwise. And that an account may be taken by and under the direction of this honorable court, of what is due and owing to your orator, for principal and interest on his said mortgage, and that the said C. D. may be decreed to pay to your orator what may be found due to him, on taking the said account, together with his costs of this suit, by a short day to be appointed by this honorable court for that purpose; or in default thereof that the said C. D. and all persons claiming under him may be absolutely debarred and foreclosed of and from all right and equity of redemption in or to the said mortgaged premises, and every part thereof, and that he may deliver up to your orator all deeds, papers, or writings in his custody or power, relating to or concerning the said mortgaged premises, or any part thereof. And that your orator may have such further and other relief in the premises as to your honor may seem meet, and the circumstances of this case require.

May it please [*prayer for process of subpoena as in No. 1.*]

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No. 383.

*Decree for strict foreclosure.*

See ante, p. 188.

At, etc. [*as in No. 255.*]

[*Title of cause.*]

This cause coming on this day to be heard, upon the pleadings filed and the proofs taken therein, and Mr. W. C. N., of counsel for the complainant, and Mr. F. S. K., of counsel for the defendant, having been heard, it is ordered, adjudged and decreed, and this court by virtue of the power and authority therein vested doth order, adjudge,

and decree that it be referred to one of the masters of this court residing in the \*county of Saratoga, to compute and ascertain what is due to the complainant for principal and interest upon the bond and mortgage mentioned in the bill in this cause. And it is further ordered that the said master tax the costs of the complainant in this cause, and add the amount thereof to the sum which shall be found due to the said complainant from the said defendant. [*If the mortgagee is, or has been at any time, in possession, add—*and that the said master take an account of the rents and profits of the mortgaged premises received by the said complainant or by any person or persons by his order, or for his use, and deduct what shall appear to be due on account of such rents and profits from the sum which shall be found due to the said complainant for principal and interest upon the said bond and mortgage.] And it is further ordered, that upon the defendant's paying unto the said complainant the amount which shall be reported due to him for principal, interest, and costs, as aforesaid, within six months after the said master shall have made his report, and after the same shall have been confirmed, at such time and place as the said master shall appoint, that the said complainant do reconvey the mortgaged premises to the said defendant, by a suitable and proper instrument of conveyance, to be approved of by the said master in case the parties cannot agree upon the form thereof, free and clear of all incumbrances done by him, or by any person claiming by, from, or under him; and that he deliver up all deeds and writings in his custody or power relating thereto, upon oath, to the said defendant, or to whom he shall appoint. And further, that the said complainant cancel and discharge such mortgage of record. But in default of the said defendant's paying unto the said complainant such principal, interest, and costs as aforesaid, by the time limited for that purpose, then it is ordered, adjudged and decreed, that the said defendant do stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the said mortgaged premises; which premises are described, in the bill of complaint and in the said mortgage, as follows: [*insert description.*]

[\*VOL. II, 625]

\*No. 384.

*Order enlarging time for payment.(a)*

See ante, p. 192.

At, etc. [*as in No. 6.*][*Title of cause.*]

The report of the master to whom it was referred to compute and ascertain the amount due to the complainant in this cause for principal and interest on his bond and mortgage, and tax his costs in this suit, having been filed and duly confirmed, from which it appears that there will be due to the said complainant, for principal, interest, and costs, the sum of \$——, on the 23d day of December instant, which was the time appointed by the said master for the payment thereof, and on reading affidavits, and on motion of Mr. F. S. K., solicitor for the defendant, and on hearing Mr. W. C. N., solicitor for the complainant, in opposition thereto, it is ordered that upon the said defendant's paying to the complainant, on or before the 23d day of December instant, the sum of \$—— reported due to the complainant for interest and costs on his said mortgage, by the said master's report, the time for the defendant's redeeming the said mortgaged premises be enlarged for six months. And upon such payment, it is ordered that it be referred back to the said master to compute the complainant's subsequent interest, and tax his subsequent costs, including the costs of this application, and to appoint a new time and place for payment of what shall be found due to the complainant in respect thereof. But in default of the defendant's paying to the complainant the said sum of \$—— by the time aforesaid, the said defendant is to stand absolutely foreclosed.(b)

(a) Where the master had appointed the 23d day of December for the payment of the principal, interest, and costs.

(b) It will be observed the above order enlarging the time is upon the terms of paying the interest and costs. Mr. Scaton remarks that formerly, the time might be enlarged without imposing any terms on the defendant; and that afterward it became the practice to enlarge the time upon computing subsequent interest upon the whole sum found due for principal, interest, and costs. But that now, the ordinary terms upon which the court enlarges the time are, the payment of the sum reported due for interest and costs, and carrying on the account of subsequent interest and costs, including the costs of the application. (*Scaton on Decrees, 142.*)

[\*VOL. II, 626]

\*No. 385.

*Affidavit of having attended to receive mortgage money.*

See ante, p. 192.

[*Title of cause.*]

City and county of Albany, ss.

G. H., of said city being duly sworn, deposeseth and saith, that on the — day of —, he did, under and by virtue of a certain power of attorney, duly executed by A. B., the complainant in this cause, bearing date the — day of —, and in pursuance of the report of D. B. G., one of the masters of this court, bearing date the — day of —, personally attend and wait at the Merchants' Exchange in the city of Albany, from before the hour of eleven of the clock in the forenoon of the said — day of —, until after the hour of twelve at noon, being the time and place mentioned in the said master's report, in order to receive from the defendant in this cause the sum of \$— by the said report reported due and directed to be paid to the said complainant for principal, interest and costs, in respect of his mortgage in question in this cause; at which time and place the said defendant did not, nor did any person or persons on his account or behalf, attend or pay to this deponent the said sum of \$— or any part thereof; and that the said sum of — still remains due and unsatisfied as he verily believes.

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 No. 386.
*Final order for strict foreclosure.*

See ante, p. 192.

At, etc. [*as in No. 255.*][*Title of cause.*]

A decree having been made upon the hearing of this cause, on the — day of — last, by which it was referred to one of the masters of this court residing in the county of Saratoga, to compute and ascertain the amount due to the complainant for principal and interest upon the bond and mortgage mentioned in the bill in this cause, and to tax the costs of the said complainant and add the amount



thereof to the sum which should be found due to him from the defendant and to fix a time and place for the payment of the said principal, interest and costs, and ordering that in default of the said defendant's paying the sum thus reported due, by the time limited for that purpose, the \*defendant should stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to, the said mortgaged premises; and the said master having, in pursuance of the said decree, on the — day of — last, made and filed his report, which has been duly confirmed, whereby he certified the sum of \$— to be due to the complainant, for principal, interest, and costs on the said mortgage, which he appointed to be paid on the — day of — last, between the hours of eleven of the clock in the forenoon and twelve o'clock at noon, at the Merchants' Exchange in the city of Albany; at which time and place G. H., being duly authorized by the complainant, attended for the purpose of receiving the said money, but neither the defendant nor any person on his behalf did then attend to pay, or have since paid or tendered the same, as by the affidavit of the said G. H. now read appears; on motion of W. C. N., solicitor for the complainant, and on hearing Mr. F. S. K., of counsel for the defendant, in opposition thereto, it is ordered and decreed that the said defendant C. D. do stand absolutely debarred and foreclosed of and from all right, title, interest, equity and benefit of redemption of, in, and to the said mortgaged premises as they are described in the said mortgage and in the said decree of the — day of —.

## CHAPTER IV.

## BILL TO REDEEM A MORTGAGE.

No. 387.

*Form of bill.*

See ante, p. 193.

[*Commence as in No. 1.*] Your orator A. B. of, etc. That on the — day of — being seized in fee of the premises hereinafter mentioned and described, and having occasion to borrow the sum of one thousand dollars, your orator did apply to C. D. of, etc. (the defendant hereinafter named) to lend him that sum of money upon the security of the said premises; which the said C. D. consented to do, and accordingly advanced the said sum of \$1,000 to your orator; and that in order to secure the re-payment thereof with interest, your orator did execute and deliver to the said C. D. an indenture of mortgage bearing date on or about — which was made between your orator of the one part and the said C. D. of the other part; and by the said indenture your [\*VOL. II, 628] orator \*for and in consideration of the sum of \$1,000 to him in hand paid by the said C. D. did grant, bargain, etc. unto the said C. D., his heirs and assigns, the premises above mentioned, and described in the said indenture as follows: [*insert description.*] To have and to hold the said premises unto the said C. D., his heirs, executors, administrators and assigns; subject to a proviso or condition of redemption by your orator on the payment of the said sum of \$1,000, with interest, on the — day of —; as in and by the said indenture of mortgage now in the custody of the said C. D., when produced, will more fully and at large appear.

And your orator further showeth unto your honor, that he has paid all the interest on the said sum of \$1,000 to the said C. D. from the date of said mortgage until the — day of —; and that he has always been, and still is, ready to pay the said C. D. what is due to him for principal and interest on the said mortgage, and costs, and

did actually, on or about the — day of — tender and offer to pay to the said C. D. the said sum of \$1,000, together with the interest then due thereon, and the costs. And your orator well hoped that the said defendant would have received the said several sums of money so tendered and offered to be paid to him by your orator as aforesaid, and that he would either have delivered up unto your orator the said indenture of mortgage to be cancelled, or have re-assigned the same to your orator, as in justice and equity he ought to have done.

But now so it is, may it please your honor, the said C. D. combining and confederating to and with divers other persons at present unknown to your orator, but whose names, when discovered, your orator prays may be inserted herein, with proper and apt words to charge them, he, the said C. D., in order to deprive and defeat your orator of the benefit of redeeming the said mortgaged premises, does pretend and give out that your orator did not borrow of him, the said C. D., the said sum of \$1,000, nor execute the said indenture of mortgage to the said C. D. for securing the re-payment thereof, with interest, as aforesaid, but does pretend that the said sum of \$1,000 was paid to your orator in consideration of the absolute purchase of the said premises; and at other times he does admit that a deed of the same date as above mentioned, and between the same parties, was executed by your orator, but that your orator did thereby absolutely dispose of and convey the said premises without any proviso or condition of redemption as above mentioned; whereas, your orator charges the contrary of such pretences to be the truth. And at other times the said C. D. admits that such indenture of mortgage was executed as above mentioned, but pretends [\*VOL. II, 629] that at the time \*of the tender above mentioned great arrears of interest were due and owing from your orator to the said C. D. amounting to \$—— over and above the sum tendered by your orator; whereas, your orator charges the truth to be that no more than the sum of \$—— was due and owing from your orator to the said C. D. for the interest upon the said \$1,000 and the costs, at the time of the said tender; and upon the pretences aforesaid the said C. D. refuses to come to any manner of account with your orator, or to re-convey the said premises to him.

All which actings, doings and pretences of the said C. D. and his confederates are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator.

In tender consideration whereof [*as in No. 1.*] To the end therefore, [*as in No. 1.*] And more especially that the said C. D. may set

forth whether your orator did not, and when, apply to him to borrow the said sum of \$1,000, or any other sum of money, and whether such indenture of mortgage was not executed by your orator to the purport and effect, and upon the condition or proviso above mentioned; and whether your orator has not paid the interest upon the said sum of \$1,000 to the said C. D., from the date of the said mortgage until the — day of —, or until some other and what time; and whether your orator did not make such tender of such several sums of money as above mentioned, to the said C. D., or how otherwise; and that the said C. D. may set forth what was due and owing to him on the said mortgage for principal and interest, and costs, at the time of the said tender. and that he may set forth why and for what reasons he refused to receive the said several sums of money so tendered as aforesaid. And that an account may be taken, by and under the decree and direction of this honorable court, of what is now due and owing to the said C. D. for principal and interest upon the said mortgage and costs; and that your orator may be at liberty to redeem the said mortgaged premises upon payment of what, if any thing, shall be found to be due to the said C. D., which your orator hereby offers to pay; and that thereupon the said C. D. may be decreed to surrender and deliver up the possession of the said mortgaged premises to your orator, free and clear of all incumbrances done by him, or by any person claiming by, from, or under him, and that he may be ordered to acknowledge satisfaction of the said mortgage and discharge the same of record. And that your orator may have such further and other relief in the premises, as the nature of his case may require and to your honor shall seem meet.

May it please your honor, [*prayer for subpoena.*]

[\*VOL. II, 630]

\*No. 388.

*Decree for redemption, (against mortgagee in possession.)*

See ante, p. 199.

At, etc. [*as in No. 255.*]

[*Title of cause.*]

This cause coming on this day to be heard upon the pleadings filed therein, and Mr. C., of counsel for the complainant, and

Mr. K., of counsel for the defendant, having been heard, it is ordered, adjudged and decreed, that it be referred to one of the masters of this court to take an account of what is due to the defendant, for principal and interest on his mortgage in the bill of complaint mentioned, and to tax his costs of this suit. And the said master is also to take an account of the rents and profits of the said mortgaged premises come to the hands of the said defendant or of any other person or persons by his order or for his use, or which he, without his wilful default, might have received. And what shall be coming on the said account of rents and profits, is to be deducted out of what shall be found due to the said defendant for principal, interest and costs. And for the better taking of the said account, the parties are to produce before, and leave with, the said master, all deeds, books, papers, and writings in their custody or power relating thereto, and are to be examined on oath, as the said master shall direct. And what, upon the balance of the said account, shall be certified to be due to the said defendant, for his principal, interest, and costs, it is ordered and decreed that the complainant do pay to the said defendant within six months after the said master shall have made his report, and the same shall have been confirmed, and after service of a notice of the order of confirmation and of a copy of the bill of costs as taxed; and that upon such payment being made, the said defendant do re-surrender the said mortgaged premises unto the said complainant, or unto such person or persons as he shall direct, free and clear of all incumbrances, done by him, or any person claiming by, from, or under him, and deliver unto the said complainant, on oath, all deeds and writings in his custody or power, relating to the said mortgaged premises. But in default of the said complainant's paying unto the said defendant what shall be so certified to be due to him for principal, interest, and costs as aforesaid, after such deductions made thereout as aforesaid, at such time and place as aforesaid, it is ordered that the said complainant's bill do from thenceforth stand dismissed out of this court, with costs to be taxed.

[\*VOL. II, 631]

\*No. 389.

*Affidavit by mortgagee of non-payment of money.*

See ante, p. 200.

[*Title of cause.*]

Saratoga county ss. C. D., the above defendant, being duly sworn, deposeth and saith that he hath not, nor hath any other person or persons on his behalf, at any time heretofore received or been paid the sum of \$—, or any part thereof, which by the decree made in this cause on the — day of —, and the master's report dated —, made in this cause pursuant to the said decree, was ordered and appointed to be paid to him, this deponent, but that the said sum of \$— now remains due and owing to this deponent upon the mortgage in the said decree and report mentioned.

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 No. 390.
*Final order for dismissal of bill for redemption.*

See ante, p. 200.

At, etc. [*as in No. 255.*][*Title of cause.*]

The report of the master to whom it was referred to take an account of what was due to the defendant in this cause, for principal and interest on his mortgage in the bill of complaint mentioned, and to tax his costs in this suit, having been heretofore filed, from which it appears that there was due to the said defendant for principal and interest upon his mortgage, at the date of said report, the sum of \$—, and that the costs of said defendant had been taxed at the sum of \$—, and the said report having been duly confirmed on the — day of — last, as appears by the certificate of the register of this court; on reading and filing the said report and certificate and due proof of service upon the said complainant, more than six months since, of notice of the order confirming said report and of a copy of the bill of costs as taxed, and on reading and filing the affidavit of the said defendant, showing that the amount reported due to the said defendant for principal, interest, and costs, has not been paid pursuant to the decree of

this court, made on the — day of —, and the said master's report, nor any part thereof, but that the said sum of \$—, and every part thereof still remains due and owing from the complainant to the said [\*Vol. II, 632] defendant for his principal, \*interest, and costs; on motion of Mr. K., of counsel for the defendant, and on hearing Mr. N., of counsel for the complainant, in opposition, it is ordered and decreed that the bill of complaint in this cause do stand dismissed out of this court with costs of the proceedings subsequent to the filing of the master's report, to be taxed; and that the defendant have execution for such costs, together with the costs heretofore taxed by said master as aforesaid.

## CHAPTER V.

## PROCEEDINGS BY AND AGAINST INFANTS.

No. 391.

*Petition for appointment of next friend.*

See ante, pp. 201, 202.

IN CHANCERY,  
Before the Chancellor.

To the Chancellor of the State of New York.

The petition of A. B., an infant under the age of twenty-one, to-wit, of the age of sixteen years and upwards, respectfully showeth :

That a suit is about to be brought in this court, by and on behalf of your petitioner, [*and others*] against C. D. Your petitioner therefore prays that R. H., of the city of Troy, counsellor at law, may, by an order of this court, be appointed the next friend of your petitioner, to appear for him, as such, in the said suit.

And your petitioner, etc.

*Consent of next friend.*

I hereby consent to be appointed the next friend of the above petitioner, and to appear for him as such, in the suit mentioned in the above petition.

Dated, etc.

R. H.

323



[\*VOL. II, 633]

\*No. 392.

*Order appointing next friend for infant.*

See ante, p. 203.

IN CHANCERY,  
Before the Chancellor.

[*or before the vice-chancellor of the — circuit.*]

In the matter of the petition of A. B., an infant.	}
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On reading the petition of A. B., an infant, praying for the appointment of R. H. as his next friend, in a suit about to be brought in this court by him [*and others*] against C. D., and the written consent of the said R. H. to accept said appointment; and the said R. H. having personally appeared before me and acknowledged that he executed, [*or it having been duly proved to me by the oath of W. S. that the said R. H. signed*] the said consent; it is ordered that the said R. H. be, and he is hereby appointed the next friend of the said petitioner, to appear for him as such in the suit referred to in the said petition, [*upon his executing a bond to the said infant in the penalty of \$—, with two sufficient sureties, conditioned that he will duly account to such infant for all moneys which may be recovered in such suit.*]

Dated, etc.

J. W., Vice-Chancellor.

[*or P. G. E., Master in chancery.*]

No. 393.

*Petition for order to sell real estate of infants.*

See ante, p. 211.

IN CHANCERY.  
Before the Chancellor.

To the Chancellor of the State of New York.

The petition of A. B., of, etc., an infant over the age of fourteen years, who has no general guardian; and of E. B., an infant under

the age of fourteen years, who has no general guardian, by C. B. his mother and next friend, respectfully sheweth :

That your petitioner A. B. is an infant of the age of sixteen years and upwards, and the said E. B. is an infant of the age of about twelve years, and that the said infants are two of the children and heirs-at-law of W. B., late of, etc., deceased; and that, as such heirs-[\*Vol. II, 634] at-law, they are \*each entitled to an undivided fifth part, subject to the right of dower of the said C. B. their mother, of a lot of land situated in the second ward of the city of Troy, with a dwelling house and out-houses thereon, and known as lot No. 160, Fourth street; also to an undivided fifth part of a certain lot, piece, or parcel of land, situate, lying and being in the town of —, in the county of —, consisting of about 300 acres of land, and bounded and described as follows: [*insert description.*] That the said house and lot in the city of Troy, are worth the sum of \$—, and produce an annual income of \$—; that the said lot or parcel of land, lying in the town of —, is worth about \$—, but is entirely unproductive, being wild and unimproved. That the brothers of your petitioners, R. B., J. B., and S. B., own the other three-fifths of the said real estate above mentioned, and threaten to commence proceedings against your petitioners for the partition thereof.

And your petitioners the said infants, further show that they do not own any other real estate than that above described—and that they have no personal estate of any kind, or to any amount whatever except their necessary wearing apparel.

And your petitioner the said C. B., the mother of the said infants, further shows, that as the widow of the said W. B., deceased, the father of the above infants, she is entitled to dower in the said real estate, and that she has no means of support for herself and her said infant children except what she and they may acquire by their industry; and that it is necessary the said premises, or some part thereof, should be sold and the proceeds, or some part thereof, be applied towards the necessary education and maintenance of said infants: and your petitioner the said C. B., hereby offers to unite in the sale of said premises, and to release her right of dower therein, upon condition that one-third part of the purchase money be securely invested, and the annual interest thereof be paid to her during her natural life; or that a gross sum be paid to her in lieu thereof, equal in value to her life estate therein, to be ascertained upon the principle of life annuities.

Your petitioners therefore pray that the said real estate may be sold

by and under the direction of this court; and that W. R., of the city of Troy, counsellor at law, who is the uncle of, [*or who is no way related to*] the said infants, may be appointed their special guardian, for the purpose of selling the interests of said infants in the said real estate. And J. N. D., and T. L., of, etc., gentlemen, are proposed as sureties for the said W. R., as such special guardian, to join with him in a bond in such penalty, and upon such condition as shall be required.

And your petitioners, etc.

[*Jurat, see No. 251.*]

[\*VOL. II, 635]

*\*Consent of guardian.*

I hereby consent to be appointed the special guardian of the above petitioners, for the purposes mentioned in the above petition.

Dated, etc.

W. R.

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No. 394.

*Certificate of master.*

See ante, p. 212.

[*Title.*]

To the Chancellor of the State of New York.

I, P. G., one of the masters of this court, residing in the county of Rensselaer, do certify and report, in pursuance of the 159th rule of this court, [if the certificate is by the assistant vice-chancellor, acting as master, say: *In pursuance of the 159th rule of this court, of an act of the legislature, passed the 4th day of March, 1840, and of an order of this court, dated the 24th day of March, 1840, I, L. H. S., Assistant vice-chancellor of the 1st circuit do certify and report,*] that W. R., the person proposed in the annexed petition as the guardian of the infants therein named, is a suitable and proper person for that purpose; that I have taken proof as to the ages of the said infants respectively, and as to the actual value of their respective interests in the real estate proposed to be sold, and as to the sufficiency of the persons proposed as sureties of the said W. R., and I find that the material facts stated in the said petition are true; and that J. N. D. and T. L., the persons proposed as sureties of the said W. R., are each worth double the value of the interest of the said infants, in the real estate proposed to be

sold, and of the interest on such value during the minorities of the said infants, over and above all debts; and that I have taken their affidavits of justification.

And I further certify and report, that the said W. R., should execute a bond with his sureties aforesaid, to each of the infants, in the penalty of \$——.

All which, etc.

Dated, etc.

P. G., Master in chancery.

No. 395.

*Order appointing special guardian.*

See ante, p. 214.

At, etc. [*as in No. 255.*]

[*Title.*]

On reading and filing the petition of A. B., of, etc., an infant over the age of fourteen years, who has no general guardian, and of E. B., [\*VOL. II, 636] \*an infant under the age of fourteen, who has no general guardian, by C. B., his mother and next friend, praying for the sale of certain real estate of the said infants therein described, under the direction of this court, and for the appointment of W. R., as special guardian, for the purpose of conducting the said sale; and on reading and filing the certificate of P. G., \*the master in chancery residing nearest the residence of the said infants, made in pursuance of the 159th rule of this court, certifying that W. R., the person proposed as such guardian in the said petition, is a suitable and proper person for that purpose, that he had taken proof as to the ages of the said infants respectively, as to the actual value of their respective interests in the real estate proposed to be sold, and as to the sufficiency of the persons proposed as the sureties of the said W. R., and that he found the material facts stated in the said petition to be true, and that J. N. D. and T. L., the persons proposed as such sureties, are each worth double the value of the interest of the said infants in such real estate, and of the interest on such value during the minorities of the said infants, over and above all debts; and that the said W. R., should

\*If the certificate is by the assistant vice chancellor, vary this order as directed in respect to the certificate. Ante, p. 635.

execute a bond, with such sureties to each of the said infants, in the penalty of \$—; and it satisfactorily appearing to the court, that there is reasonable ground for the application; on motion of W. N., solicitor for the said petitioners, ordered that W. R. be, and he is hereby appointed the special guardian of the said infants for the purposes of such sale, upon his executing, together with J. N. D. and T. L., as his sureties, a bond to each of the said infants, in the penalty of \$—, conditioned for the faithful performance by the said W. R., of the trust reposed in him as such guardian, and for paying over, investing and accounting for, all moneys that shall be received by him, according to the order of any court having authority to give directions in the premises, and to observe the orders and directions of this court in relation to the said trusts, and filing the same in the office of the register of this court; which bond shall be approved of, as to its form and manner of execution, by the said master, signified by his approbation indorsed thereon. And it is further ordered, that it be referred to P. G., the said master, to ascertain the truth of the facts stated in the said petition, and to examine and report thereon, agreeably to the 160th rule of this court; and that he summon before him such of the relatives and friends of the said infants, and other persons, as he may think proper, and examine them on oath, in relation to the matters of the said reference. And the said master is required to ascertain the value of the dower right in said premises, of any person entitled to the same, and who is willing to join in the sale, on the principle of [\*Vol. II, 637] life annuities. And it is further \*ordered that the said master shall not proceed on such reference, until the certificate of the register of this court is produced to him, showing that the security required to be given by such special guardian, has been duly proved or acknowledged, and filed in his office.

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No. 396.

*Bond of special guardian.*

See ante, p. 213.

Know all men by these presents, that we W. R., J. N. D. and T. L., of, etc. are held and firmly bound unto A. B. in the penal sum of \$—, to be paid to the said A. B., his heirs, executors, administrators or as-

signs; for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the — day of —, one thousand eight hundred and forty-four. (\*)

Whereas, by an order of the court of chancery of the state of New York made on the — day of —, the above bounden (†) W. R. was appointed special guardian of the above named A. B., an infant under the age of twenty-one years, for the purpose of making a sale of certain real estate belonging to said infant and mentioned in said order, upon his giving the bond therein required: Now therefore, the condition of this obligation is such, that if the above bounden W. R. shall faithfully perform the trust reposed in him as such special guardian, and shall duly pay over, invest, and account for, all moneys that shall be received by him, according to the order of any court having authority to give directions in the premises, and shall observe the orders and directions of the court of chancery in relation to such trust, then this obligation to be void, otherwise to be and remain in full force and virtue.

Sealed and delivered  
in presence of  
G. D.

W. R. (L. S.)  
J. N. D. (L. S.)  
T. L. (L. S.)

*Acknowledgment of bond.*

STATE OF NEW YORK, {  
Saratoga county, } ss.

On this — day of —, before me, a justice of the peace in and for said county, came the above named W. R., J. N. D. and T. L., to me well known to be the persons described in, and who executed the above instrument, and severally acknowledged that they executed the same.

R. C., Justice of the peace.

[\*VOL. II, 638]

*\*Approval of bond by master.*

I approve of the within bond, as to its form and manner of execution.  
Dated, etc.

P. G., Master in chancery.

## No. 397.

*Register's certificate of the filing of security.*

See ante, p. 215.

[*Title.*]

I do hereby certify, that the security required by the order of this court, made on the — day of —, to be given by W. R., the special guardian appointed by the court in the above matter, has been duly proved or acknowledged and filed in my office agreeably to the said order.

Dated, etc.

J. M. D., Register [*or clerk.*]

## No. 398.

*Master's report under No. 395.*

See ante, p. 215.

[*Title.*]

To the Chancellor of the State of New York.

In pursuance of an order made in the above entitled matter, on the — day of —, by which it was referred to me to ascertain the truth of the facts stated in the petition in the above matter, and to examine and report thereon, agreeably to the 160th rule of this court, and to ascertain the value of the dower right in the premises mentioned in the said petition, of any person entitled to the same and who is willing to join in the sale, on the principle of life annuities,

I the subscriber, one of the masters of this court, do respectfully report that I have been attended by W. N., the solicitor for the petitioner, who produced before me a certificate of the register of this court that the security required to be given by W. R. the special guardian, had been duly proved or acknowledged and filed in his office agreeably to the said order; and having summoned before me such of the relatives and friends of the said infants, and other persons as appeared likely to possess any information in relation to the matters of the reference, and examined them on oath in relation thereto, I am satisfied that all the material facts stated in the said petition are true, and that a sale of the whole of the real estate belonging to said infants [\*VOL. II, 639] would be for their benefit; \*and that my reasons for

this opinion are the same as those set forth in the said petition, together with the probability that if the interests of the said infants are not sold, under the direction of this court, proceedings will be commenced against such infants, by the adult joint owners, or some of them, for the partition thereof; which proceedings would subject the infants to great expense, and much greater than that attending a sale under the direction of this court.

I do further report that the said premises are worth, in the aggregate, the sum of \$—; that the house and lot in the city of Troy are worth \$—, and that the lot of land situate in the town of —, in the county of —, is worth \$—; that the said premises are very unproductive, considering the value thereof, as they only yield an annual income to the said infants of about \$—.

And I do further report, that in my opinion it will be for the interests of the said infants to have the said real estate sold, upon the following terms and conditions: That so much of the proceeds of their shares or interests in the same as may be necessary to pay their respective proportions of the gross value of the right of dower of their mother C. B., therein, and the costs of these proceedings, be paid by the purchaser on the delivery of the deed; and that the payment of the residue of the purchase money of the interests of said infants be secured by the bond of the purchaser and a mortgage upon the said premises to be given to the register of this court, in trust for the said infants, conditioned to pay the interest thereon, semi-annually, at the rate of seven per cent. per annum, and the principal in two equal instalments, one of which shall be paid on the day when the said A. B. shall arrive at the age of twenty-one years, and the other on the day when the said E. B. shall arrive at full age.

I do further report, that the said infants are not in absolute need of any part of the proceeds of said sale for their support and maintenance, over and above the interest or income thereof, [*and their other property*] together with what they may earn by their own exertions.

And I do further report, that C. B., the mother of the said infants, and who is entitled to her dower in the premises, is willing to join in the said sale; and that I have ascertained the value of her life estate in the premises on the principle of life annuities; and that the present value of the same is \$—.

All of which, etc.

P. G., Master in chancery.

Dated, etc.



[\*VOL. II, 640]

\*No. 399.

*Order, upon master's report, authorizing guardian to contract.*

See ante, p. 215.

At, etc. [*as in No. 255.*][*Title.*]

On reading and filing the report of P. G., one of the masters of this court, made in the above matter, and bearing date the — day of —, in pursuance of an order of this court made on the — day of —, from which it appears satisfactorily to this court that the interests of the said infant will be promoted by a sale of their shares in the real estate mentioned in the petition in this matter, for the reasons stated in said report; on motion of W. N., of counsel for the said petitioner, it is ordered that the said report be and the same is hereby confirmed. And it is further ordered that W. R., the special guardian of said infants, be and he is hereby authorized and empowered to contract for the sale and conveyance of all the right, title and interest of the said infants in and to such real estate; at a price not less than the sum specified by said master in his report as the value thereof, and upon the terms and conditions therein specified. And it is further ordered that before executing any deed or instrument of conveyance of the said premises to the purchaser or purchasers thereof, the said guardian report to this court, upon oath, the terms and conditions of the agreement made by him for the sale of such premises.

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 No. 400.
*Report by special guardian, of agreement to sell.*

See ante, p. 215.

[*Title.*]

To the Chancellor of the State of New York.

In pursuance of an order of this court, made in the above matter, on the — day of — authorizing and empowering me, as the special guardian of the infants, therein named, to contract for the sale and conveyance of all the right, title, and interest of the said infants in and to the real estate mentioned and described in the petition of the said infants in this matter, dated the — day of —, and to report, upon

oath, the terms and conditions of the agreement made by me with the purchaser or purchasers, before executing any deed or instrument of conveyance of the said premises,

\*I, the said special guardian, do certify and report [\*VOL. II, 641] that I have entered into an agreement subject to the approbation of the court, with B. P. J., of, etc., for the sale of all the right, title, and interest of the said infants in and to the said real estate, upon the following terms and conditions: the said B. P. J. to pay therefor the sum of \$—— as follows: so much of the said purchase money as may be necessary to pay the respective proportions of such infants, of the gross value of the right of dower of their mother C. B. therein, and the costs of these proceedings, on the delivery of the deed; and the payment of the residue of said purchase money to be secured by the bond of the purchaser, and a mortgage upon the said premises to be given by him to the register of this court, in trust for the said infants, conditioned to pay the interest thereon, semi-annually, at the rate of seven per cent. per annum, and the principal in two equal instalments, one of which shall be paid on the day when the said A. B. shall arrive at the age of twenty-one years, and the other on the day when the said E. B. shall arrive at that age. That the gross value of the right of dower of the said C. B. in the said premises is \$——, and the costs of these proceedings amount to \$——, after deducting which sums from the amount of the purchase money as aforesaid, there will remain the sum of \$—— due to the said infants collectively, to be secured as aforesaid, or \$—— to each.

And I further report that the above are the best terms upon which I could sell the said property; and that in my opinion the premises are an ample security for the payment of the balance of the purchase money not paid down, and the interest.

All which is respectively submitted.

W. R., special guardian.

Dated, etc.

Rensselaer county, ss. W. R., the special guardian named in the above report, being duly sworn, deposeth and saith that he has read the above report, to which he has subscribed his name, and knows the contents thereof, and that the matters therein stated are true.

Sworn, etc.

W. R.

## No. 401.

*Order confirming guardian's report, and directing a conveyance*

See ante, p. 215.

At, etc., [as in No. 255.]

[Title.]

On reading and filing the report of W. R., the special guardian of [\*VOL. II, 642] the \*above infants, made in pursuance of the order of this court, dated the — day of —, stating that in pursuance of said order he had entered into an agreement, subject to the approbation of this court, with B. P. J., for the sale of all the right, title and interest of the said infants in and to the real estate mentioned in said order, upon the terms and conditions specified in the said report; on motion of Mr. W. N., of counsel for the said petitioners, it is ordered that the said report, and the agreement therein mentioned be, and the same are hereby ratified and confirmed. And it is further ordered that the said special guardian do execute, acknowledge, and deliver to the said B. P. J., a good and sufficient conveyance of all the estate, right, title, and interest of the said infants in and to the premises aforesaid, upon his complying with the terms and conditions upon which, by the said agreement, the deed was to be delivered. And it is further ordered, (\*) that out of the purchase money paid by the said B. P. J. upon the delivery of the deed, the said special guardian do pay the sum of \$— to C. B. for her dower right in the shares of the said infants in the premises, and take her receipt in full discharge thereof; and that he pay to the solicitor for the petitioners, the costs of these proceedings, to be taxed. And it is further ordered that the moneys which shall be received by the register from time to time for interest upon the bond and mortgage given by the purchaser, be paid over by him to the special guardian, to be applied by such special guardian to the maintenance and education of the said infants.

## No. 402.

*Another form of order of confirmation, where proceeds are retained by guardian.(a)*

See ante, p. 215.

[As in No. 401 to the asterisk (\*) then] that so much of the proceeds of said sale as shall be requisite, be applied to the payment of the expenses of said sale; together with the costs of these proceedings, to be taxed; and of the remainder of such proceeds so much as may be immediately necessary be applied by such special guardian to the maintenance and education of the said infants; and that the [\*Vol. II, 643] residue thereof \*be kept or put out at interest, or invested on bond and mortgage, for the benefit of the said infants; and that the said special guardian do make a return to the court in writing and upon oath, of the investment and disposition of such residue of the proceeds, as soon as may be.

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 No. 403.

*Another form of order of confirmation—where the amount of the proceeds exceeds \$500, and no real security has been given by the guardian.*

See ante, p. 215.

[As in No. 401 to the asterisk,(\*), then] that the said special guardian bring the share or portion of the consideration money received by him upon said sale, which belongs to the said infants, after paying thereout to the solicitor of the said infants the costs of these proceedings, to be taxed, into court, and deposit the same with the register thereof, to be invested in stocks, or put out at interest by him, for the benefit of the said infants.

(a) In the case contemplated in No. 401, the proceeds are not retained by the guardian; the whole amount of the cash payment being applied to extinguish the claim of dower, and to pay the costs. No. 402 is adapted to the case where the proceeds are retained by the guardian, he having given real security, or the proceeds not exceeding \$500.

## No. 404.

*Deed by special guardian.*

See ante, p. 216.

This indenture, made the — day of —, between W. R., of, etc., special guardian of A. B. and E. B., infants under the age of twenty-one years, of the first part, and B. P. J., of, etc., of the second part. Whereas a petition was heretofore presented to the chancellor of the State of New York by the said A. B., who is an infant over the age of fourteen years and having no general guardian, and by C. B., the mother and next friend of the said E. B., who is an infant under the age of fourteen years and having no general guardian, on his behalf, praying for a sale of the right, title and interest of the said infants in the real estate therein mentioned, and whereas such proceedings were afterwards had in the said court, upon the said petition, that by an order of said court made on the — day of —, the said W. R. was appointed the special guardian of the said infants for the purposes of the said application, upon his giving the security therein required; and whereas such security, duly approved and acknowledged, was subsequently filed by the said guardian in the proper office; and whereas by another order of the said court, made on the — day of —, the said W. R. was authorized and empowered to [\*VOL. II, 644] \*contract for the sale and conveyance of the right, title, and interests of the said infants in such real estate, at a price not less than that specified in the master's report referred to in said order, and upon the terms and conditions therein mentioned. And whereas, in pursuance of the last mentioned order, the said special guardian afterwards made his report, dated the — day of —, to the said court, stating that he had entered into an agreement, subject to the approbation of the said court, with B. P. J., of, etc. for the sale of all the right, title and interest of the said infants in and to the said real estate, upon the terms and conditions therein mentioned; whereas by another order of the said court, made on the — day of —, it was ordered that the said report of such special guardian, and the agreement therein mentioned, be, and the same were thereby ratified and confirmed; and whereas it was further ordered by the said court, in and by the said last mentioned order, that the said special guardian should execute, acknowledge and deliver to the said B. P. J. a good and sufficient conveyance of all the estate, right, title and interest of

the said infants in and to the said premises, upon his complying with the terms and conditions upon which, by the said agreement, such deed was to be delivered. And whereas the said B. P. J., the purchaser aforesaid, has complied with the terms and conditions of the said agreement :

Now, therefore, this indenture witnesseth that the said party of the first part, special guardian as aforesaid, by virtue of the power and authority conferred upon him by the several orders above mentioned, and in pursuance of the statute in such case made and provided, for and in consideration of the sum of \$—— to him in hand paid, at or before the ensealing and delivery of these presents, by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, sold, remised, released and conveyed, and by these presents doth grant, bargain, sell, remise, release and convey unto the said party of the second part, his heirs and assigns forever, all the right, title and interest of the said infants A. B. and E. B. of, in and to (\*) all that certain [*insert description.*] To have and to hold the said premises, and every part and parcel thereof, with the appurtenances, to the said B. P. J., his heirs and assigns, to his and their only proper use, benefit and behoof forever.

In witness whereof, etc.

Sealed and delivered

W. R. [L. s.]

in presence of

L. M.

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[\*VOL. II, 645]

\*No. 405.

*Guardian's report of the investment and disposition of proceeds of sale, when they are retained by him.*

See ante, p. 215.

[*Title.*]

To the Chancellor of the State of New York.

I, W. R., the special guardian of the above infants, having been required by an order of this court made on the —— day of ——, to keep or put out at interest, or invest on bond and mortgage, for the benefit of the said infants, the residue of the proceeds of the sale of the real estate of the said infants, which should remain after paying the expenses of such sale together with the costs of the proceedings in this matter, to be taxed, and after applying so much thereof as might

be immediately necessary to the maintenance and education of the said infants, to make a return to the court, in writing, and upon oath, of the investment and disposition of such residue of the proceeds—do respectfully report :

That the residue of the said proceeds, after paying thereout the sums directed by said order to be paid by me, amounted to the sum of \$——, which I have invested at an interest of six per cent per annum, payable semi-annually, on good security by bond and mortgage, to wit, the bond of J. D., of, etc. and a mortgage executed and acknowledged by him and his wife to the said infants upon unincumbered real estate in the town of ——, worth double the value of such proceeds; which mortgage I have caused to be recorded in the office of the clerk of the county of ——.

All which is respectfully submitted.

Dated, etc.

W. R.

[*Jurat—see oath to No. 400.*]

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No. 406.

*Petition for appointment of a general guardian.*

See ante, p. 219.

IN CHANCERY.

Before the Chancellor.

To the Chancellor of the State of New York.

The petition of A. B., of, etc., an infant over the age of fourteen years, respectfully sheweth: That your petitioner is the daughter of [\*VOL. II, 646] C. B., \*late of, etc., deceased, and is of the age of about fifteen years. That as one of the devisees of her said father, now deceased, your petitioner is seised of and entitled to an estate in fee in and to a certain house and lot situate in the fourth ward of the city of Albany, and known as lot No. 52 — street, the gross income of which is about \$—— annually; also to a certain farm or lot of land situate in the town of ——, in the county of ——, consisting of about 100 acres, the gross annual income of which is about \$——. That she is also entitled to the following personal estate, viz.: a horse of the value of about \$50, two cows of the value of about \$20 each, a promissory note given by J. T. to her said father previous to his death,

for the sum of \$100, and interest from the — day of —, which note become due and payable on the — day of — last, and that no part thereof has been paid.

And your petitioner further showeth, that she has not, to her knowledge or belief, any other property, real or personal, nor any right or interest in any other property than that above specified. That on account of her tender age, and of her own inability to protect her rights and interests, she is desirous of having some suitable and proper person appointed by this court to take charge thereof.

Your petitioner therefore prays that P. M., of, etc. physician, who is her uncle, may be appointed the general guardian of her person and estate, upon his giving security for the faithful performance of his trust as such guardian, according to the statute, and in conformity with the rules and practice of this court.

And your petitioner, etc.

Dated, etc.

A. B.

[*Usual jurat.*]

*Consent of guardian.*

I hereby consent to be appointed the general guardian of the above petitioner; and I offer as my sureties W. N. and R. S. both of, etc.

Dated, etc.

P. M.

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No. 407.

*Master's report, on petition for general guardian.*

See ante, p. 220.

IN CHANCERY.

Before the Chancellor,

In the matter of the petition of A. B., an infant.	}
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To the Chancellor of the State of New York.

\*In pursuance of the provisions of the 151st and 152d [\*VOL. II, 647] rules of this court, I the subscriber, the master residing nearest to the residence of the said infant, do certify and report that the petition of



the said infant in the above matter having been presented to me, to the end that the inquiries and examinations directed by the said 151st rule might be made, and having been attended by the said A. B. and her solicitor, I have proceeded to make such inquiries and examinations, having previously directed notice to be given to the mother of the said infant, with whom she resides, and to G. B., her uncle, to appear before me if they desired to be heard in relation to the said application; and having required the attendance of such witnesses before me as appeared to me to be necessary, to give testimony on the subject of such application.

And I further report, that from an inspection of the said infant, as well as from the affidavit of F. B., her mother, taken before me, I am satisfied the age of the said infant is about fifteen years; that I have examined her as to her nomination of a guardian, and that she voluntarily nominated P. M. of, etc. to be her general guardian; and that I am of opinion the said P. M. is a suitable and proper person to be appointed such guardian.

I further report, that the amount, nature, and value of the real and personal property of the said infant is correctly stated in the said petition; that the gross amount or value of the rents and profits of the said real estate is about \$— annually, and that the aggregate amount of such rents and profits during her minority will be the sum of \$—.

And I further report that such guardian has offered W. N. and R. S., both of, etc., as his sureties; and having taken from each of them an affidavit as to his sufficiency, and made inquiries relative thereto, I am satisfied that the sureties so offered are sufficient; and I certify that each of such sureties is worth the sum of \$— over and above all his debts.

And I further report that the said guardian should be required to give security in the sum of \$—.

All which, etc.

Dated, etc.

P. G. E., Master in Chan'y.

No. 408.

*Order appointing general guardian.*

See ante, p. 221.

At, etc. [*as in No. 255.*][*Title.*]

On reading and filing petition of A. B., an infant over the age of [\*VOL. II, 648] \*fourteen years, praying for the appointment of P. M. as the general guardian of her person and estate, upon his giving the requisite security, together with the consent of the said P. M. to be appointed such guardian, and the proposal by him of W. N. and R. S., of, etc., as his sureties, and on reading and filing the report of P. G. E., master in chancery, made in pursuance of the 151st and 152d rules of this court; and on motion of W. C. N. of counsel for said infant, ordered that the said P. M. be, and he is hereby appointed the general guardian of the person and estate of the said infant, upon his executing a bond to the said infant, with the said W. N. and R. S. as his sureties, in the penal sum of \$—— conditioned that the said P. M. shall faithfully perform his trust as such guardian, and file an inventory of the estate of said infant within six months after his appointment, and render the annual inventory or account of his guardianship required to be rendered and filed by the 154th rule of this court; that he shall observe and obey all the general rules of this court respecting general guardians, and such orders as shall be made by this court from time to time in relation to such trust; and that he shall render a just and true account of all moneys and property of the said infant, which shall come to his hands as such special guardian, and of the application thereof, and of his guardianship generally, before any court having jurisdiction, whenever he shall be thereunto lawfully required. And it is further ordered that the execution of said bond be acknowledged or proven, as required by statute, and approved of as to its form and manner of execution, by the said master, to be signified by his approval indorsed thereon, and filed in the office of the register [*or clerk*] of this court.

## No. 409.

*Bond of general guardian.*

See ante, p. 220.

Know all men by these presents that we, P. M., of, etc., and W. N. and R. S., of, etc., are held and firmly bound unto A. B. in the sum of \$—, [*continue as in No. 396 to the asterisk (\*), then*]

Whereas, by an order of the court of chancery of the state of New York, made on the — day of —, the above bounden P. M. was appointed the general guardian of the person and estate of the above named A. B., an infant under the age of twenty-one years, upon his executing a bond to the said A. B., with the said W. N. and R. S., as his sureties, in the penalty and upon the condition therein mentioned—[\*VOL. II, 649] Now \*therefore the condition of this obligation is such that if the above bounden P. M. shall faithfully perform his trust as such guardian, and shall file an inventory of the estate of the said infant within six months after his appointment, and render the annual inventory or account of his guardianship required to be rendered and filed by the 154th rule of the said court of chancery, and shall observe and obey all the general rules of said court respecting general guardians, and such orders as shall be made from time to time by the said court in relation to such trust; and if he shall render a just and true account of all moneys and property of the said infant which shall come to his hands as such special guardian, and of the application thereof, and of his guardianship generally, before any court having jurisdiction, whenever he shall be thereunto lawfully required—then this obligation to be void; otherwise to be and remain in full force and virtue.

*Acknowledgment and approval*—See No. 396.

## No. 410.

*Inventory and account current of general guardian.*

See Appendix to Rules, No. 17,

## CHAPTER VI.

PROCEEDINGS RESPECTING IDIOTS, LUNATICS, HABITUAL  
DRUNKARDS, ETC.

No. 411.

*Petition for a commission of lunacy.*

See ante, p. 227.

IN CHANCERY.

Before the Vice-Chancellor of the fourth circuit.

In the matter of J. D. a supposed lunatic.
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To the Chancellor of the State of New York.

The petition of A. D. of the town of Wilton, in the county of Saratoga, respectfully showeth—

That J. D. a resident of the same town, farmer, who is a brother of [\*VOL. II, 650] \*your petitioner, now is, and for the space of twelve months last past, has been a lunatic, and altogether unfit and unable to govern himself, or to manage his affairs, as by the affidavits hereto annexed appears.

Your petitioner therefore prays, that a commission in the nature of a writ *de lunatico inquirendo*, may issue, to inquire of the lunacy of the said J. D., directed to such persons as to your honor shall seem meet.

And your petitioner, etc.

[*Jurat as in No. 251, to the asterisk (\*).*]

A. D.

*Affidavits annexed.*

[*Title as in No. 411.*]

Saratoga county, ss. C. D. of, etc., servant to J. D., being duly sworn, says, that he has lived about a year and ten months in the service of the said J. D.; and that according to the best of his judgment and

belief, the said J. D. has been for some time past of unsound mind and understanding. And this deponent further says, that the actions and words of the said J. D., during the last three months have been those of an insane person; and particularly within the last fifteen days. That about a fortnight ago, the said J. D. desired this deponent to stay in the room with him, and keep a poker in his hand, as spirits were flying about the room, and that he was afraid of being attacked by them. And this deponent further saith, that the said J. D. would not speak the two following days, nor take any sustenance; and that deponent believes that the said J. D. is still of unsound mind and understanding, and unfit for the management of his concerns.

Sworn, etc.

C. D.

[*Title.*]

Saratoga county, ss. P. R., of the town of —, in said county, doctor of physic, being duly sworn, says, that he this deponent, for some time past has attended J. D., of said town, professionally; and that the said J. D. has, for more than three months last past, labored under the most disturbed imagination and mental derangement. That on the — day of — last, he informed the brother of the said J. D., that the mind of the said J. D. was very far from being in a comfortable state, and that there was reason to apprehend an actual derangement of it, and that he might do some injury either to himself or others, unless he was watched very closely.

And this deponent further says, that he continued to attend the said J. D., and found him in the same state at every interview. That on the — day of —, deponent was sent for to attend a consultation with G. H., doctor of physic, and that deponent then saw the said J. D., who could not be prevailed upon to speak, or to take any sustenance; [\*Vol. II, 651] \* that he has not seen the said J. D. since, until the — day of —, when deponent found him in the same deranged state of mind; and that he is of opinion that said J. D. is unfit for the management of his concerns.

Sworn, etc.

P. R.

## No. 412.

*Petition for a commission of lunacy, on the ground of extreme old age.*

[*Title and address as in No. 411.*] The petition of H. P., of, etc., one of the nephews and next of kin of the said J. D., the supposed lunatic, respectfully sheweth.

That J. D., of, etc., your petitioner's aunt, who is of the age of ninety years and upwards, is from such her extreme age so far deprived of her reason and understanding, that she is rendered altogether unfit and unable to govern herself, or to manage her affairs, as by the affidavits hereunto annexed appears. [*Conclude as in No. 411.*]

## No. 413.

*Petition for a commission of lunacy, that the validity of a marriage may be ascertained.*

[*Title and address as in No. 411.*] The petition of T. B., of, etc., the nephew of the said J. D., the supposed lunatic, respectfully sheweth.

That the said J. D. your petitioner's aunt, now is, and for these ten months last past, has been so far deprived of her reason and understanding, as to be altogether unfit and unable to govern herself, or to manage her affairs, as by the affidavits hereunto annexed appears. That the said J. D. is upwards of seventy-two years of age; and that on or about the — day of — last, whilst she was in the situation before described, she was prevailed upon by W. D., who claims to be her present husband, and who is only twenty-five years of age or thereabouts, and whom she had only known about five days, to contract matrimony with him; with a view, as your petitioner conceives, to get possession of her property; and their marriage was that day solemnized at —.

Your petitioner therefore prays, that your honor will be pleased to order that a commission, in the nature of a writ *de lunatico inquirendo*, may issue, to inquire of the lunacy of the said J. D., as well before and [\*Vol. II, 652] \*at the time of her said marriage with the said W. D., as at this present time, directed to such persons as your honor shall think fit.

And your petitioner, etc.(a)

(a) The order upon this petition should require notice of executing the commission to be given to W. D., the husband. See 2 Coll. Lun. 217.

## No. 414.

*Petition for a commission of idiocy.*

See ante, p. 227.

IN CHANCERY.

Before the Vice-Chancellor of the 4th circuit.

In the matter of J. D., a supposed idiot.
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To the Chancellor of the state of New York.

The petition of A. D., of, etc., respectfully showeth—That J. D. of the same place, laborer, who is the father of your petitioner, has been from the time of his birth, and still is, wholly deficient in reason and understanding, and to all intents and purposes an idiot; as by the affidavits annexed appears.

Your petitioner therefore prays, that a commission in the nature of a writ *de idiota inquirendo* may issue to inquire of the idiocy of the said J. D., directed to such persons as your honor shall think fit.

And your petitioner, etc.

[*Jurat as in No. 411.*]

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 No. 415.
*Petition by overseers of the poor, for a commission against a habitual drunkard.*

See ante, p. 228.

IN CHANCERY.

Before, etc.

In the matter of C. P., an habitual drunkard.
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To the Chancellor of the state of New York.

The petition of J. D. & C. H., overseers of the poor of the town of —, in the county of —, respectfully showeth,

That C. P., a resident of the said town of —, farmer, is now, and [\*Vol. II, 653] \*for more than a year last past has been an habitual drunkard. That he is aged about forty-eight years, and has a wife and two small children; that he is seised and possessed of real estate, consisting of a farm of about one hundred acres, with a dwelling-house and barn thereon, of the value of about eighteen hundred dollars, and personal estate to the amount of about one thousand dollars, and is now owing debts to the amount of about nine hundred dollars. That about two years since the said C. P. became quite intemperate; so much so as to neglect his business, and by far the greater portion of his time to be entirely unfit for the transaction of business; and that during the six months last past has had few, if any, rational or sober intervals.

And your petitioners further show, that in consequence of his said intemperance, the said C. P. is rapidly squandering his property, and is constantly liable to be defrauded and plundered by others; and that if he is allowed to have the control and management of his property much longer, he will, as your petitioners verily believe, soon squander and be stripped of what now remains, and he and his family will become burthens to the town in which they reside; which facts will more fully appear by the affidavits hereto annexed.

Your petitioners therefore pray that a commission in the nature of a writ *de lunatico inquirendo* may issue, to inquire of the habitual drunkenness of the said C. P., directed to such persons as to your honor shall seem meet.

And your petitioner, etc.

Dated, etc.

[*Jurat.*]

J. D. } Overseers  
C. H. } of the poor.

No. 416.

*Order for a commission of lunacy, or idiocy, or habitual drunkenness.*

See ante, p. 228.

At, etc. [*as in No. 255.*]

[*Title.*]

On reading and filing the petition of —, of, etc. bearing date the — day of —, and the affidavits and other papers thereto annexed,



and on motion of Mr. N., of counsel for the petitioner, ordered, that a commission in the nature of a writ *de lunatico* [*or idiota*] *inquirendo* be issued out of, and under the seal of this court, in the usual [\*VOL. II, 654] \*form, directed to H. R., physician, J. A. C., counsellor at law, and L. E., farmer, all of the county of Saratoga, to inquire by a jury of said county and of the neighborhood where the said J. D. resides, of the lunacy [*or idiocy or habitual drunkenness,*] of the said J. D., and that in the said commission be inserted a command to the sheriff of the said county of Saratoga, requiring him to summon such jury. And it is further ordered, that the said commission be executed at, or at some convenient place near to, the residence of the said J. D.; and that previous notice of the time and place of such execution be given to the said J. D. and to the person or persons having the charge and care of him. And it is further ordered, that upon the execution of the said commission, the person or persons having charge of the said J. D., or in whose custody he shall be, do produce him before the said commissioners and jury, to be inspected and examined by them, whenever required to do so by such commissioners.

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No. 417.

*Commission to inquire of idiocy or lunacy.*

See ante, p. 229.

The People of the State of New York to H. R., J. A. C. and [L. s.] L. E., of the county of Saratoga, greeting: Know ye, that we have assigned to you, or any two or more of you, to inquire, by the oaths of good and lawful men of our county of Saratoga, by whom the truth of the matter may be the better known, whether J. D., of the town of Wilton, in said county is a lunatic, or enjoys lucid intervals [*or is an idiot*] so that he is not sufficient for the government of himself, or for the management of his lands, tenements, goods and chattels; and if so, from what time, after what manner, and how; and if the said J. D., being in that condition, hath alienated any lands and tenements, or not; and if so, what lands and tenements, to what person or persons, when, where, after what manner, and how; and what lands and tenements, goods and chattels as yet remain to him; and of what value the lands and tenements by him alienated, as well as those

by him retained, are ; and how much the issues and profits thereof are worth by the year, and what is the value of his goods, chattels and personal estate, and who are the nearer heirs of the said J. D. who will be entitled to his estate in case of his death, and of what age: And therefore we command you, or any two or more of you, that at certain days and places which you shall for that purpose appoint, you [\*VOL. II, 655] diligently make inquisition in the \*premises ; and that you cause reasonable notice of the time and place by you appointed for that purpose to be given to the said J. D., and that you send the inquisition which you shall thereupon make, under your seals, or the seals of any two or more of you, and the seals of those persons by whom it shall be made, distinctly and plainly and without delay to our [*vice*] chancellor [*of the fourth circuit*], in our court of chancery, together with this writ. And by the tenor of these presents we command our sheriff of our county of Saratoga aforesaid, that at certain days and places which you shall make known to him, he cause to come before you, or any two or more of you, so many, and such good and lawful men of his bailiwick as you shall direct, by whom the truth of the matters aforesaid may be the better known and inquired into. Witness, Reuben H. Walworth, chancellor of our said state, at —, the — day of —, one thousand eight hundred and forty-four.

W. N. C., Solicitor.

G. M. D., Clerk.

Indorsed—"By the Court."

G. M. D., Clerk.

*Return to commission.*

The execution of this commission appears in the schedule hereunto annexed.

Dated, etc.

H. R.	} Commissioners.
J. A. C.	
L. E.	

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No. 418.

*Commission to inquire of habitual drunkenness.*

See Appendix to Rules, No. 11.

## No. 419.

*Precept to sheriff to summon a jury.*

See ante, p. 229.

By virtue of a commission in the nature of a writ *de lunatico* [*or idiota*] *inquirendo*, issued out of and under the seal of the court of chancery, bearing date on the — day of — instant, to us whose names are here underwritten directed, to inquire if J. D. of the town of Wilton, in the county of Saratoga be a lunatic [*or idiot or habitual drunkard,*] or not; these are to will and require you to cause to come and [\*VOL. II, 656] appear \*before us twenty-four honest and lawful men of the county aforesaid, and of the neighborhood where the said J. D. resides, on the — day of — next, by ten o'clock in the forenoon of the same day, at the house of R. S. in the said town of Wilton, then and there upon their oaths to inquire of the lunacy [*or idiocy or habitual drunkenness*] of the said J. D.; and of all such matters and things as shall be given them in charge by virtue of said commission; and hereof fail not at your peril.

Given under our hands and seals this — day of —, in the year of our Lord one thousand eight hundred and forty-four.

To the sheriff of the } county of Saratoga. }	H. R. [L. s.] } J. A. C. [L. s.] } L. E. [L. s.] }	Commissioners.
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*The return of the sheriff, indorsed on the back of the precept.*

The execution of this precept appears in the panel hereto annexed.

R. F., Sheriff.

Names of the jurors summoned to inquire according to the tenor of the precept annexed. [Names of jurors.]

## No. 420.

*Notice to lunatic, or idiot, etc. of executing commission.*

See ante, p. 230.

[Title.]

Sir:

Take notice, that a commission to inquire as to your alleged lunacy [*or idiocy, or habitual drunkenness*] issued out of and under the seal of

the court of chancery, and to us directed as commissioners, will be executed at the house of —, in the town of Wilton, on the — day of — instant, at ten o'clock A. M.

Dated, etc.  
To J. D.

[Signed by commissioners.]

No. 421.

*Warrant to produce lunatic, etc.*

See ante, p. 231.

By virtue of a commission in the nature of a writ *de lunatico*, [or *idiota*,] *inquirendo*, issuing out of and under the seal of the court of chancery of the state of New York, bearing date at —, the — day of —, to us whose names are hereunder written directed, to inquire whether J. D., of the town of Wilton, in the county of Saratoga be [\*Vol. II, 657] a \*lunatic [or *idiot*, or an *habitual drunkard*] or not, these are to will and require you (\*) to produce before us the said J. D. at the execution of the said commission, at the house of —, in the said town of Wilton, on the — day of — instant, at ten o'clock in the forenoon, there to be examined, touching the matters aforesaid; and you are to give him notice accordingly; as also to any other person or persons who are guardians of him, or trustees of his estate, that they may appear in his defence if they shall think fit. Given under our hands and seals this — day of —, 1843.

[Signed and sealed by commissioners.]

To Mr. L. M. or such other person }  
or persons as now have the said }  
J. D. in their custody or power. }

No. 422.

*Subpœna for witnesses on execution of commission.*

See ante, p. 232.

By virtue of [as in last form to the asterisk, (\*) then proceed] that you and each of you personally be and appear before us at the execution

of the said commission, at the house of —, in the said town of Wilton, on the — day of — instant, at ten o'clock in the forenoon, upon your several and respective oaths to testify the truth according to your knowledge touching the lunacy [*or idiocy, or habitual drunkenness,*] of the said J. D. ; and of all such matters as shall be demanded of you by virtue of the said commission. Hereof fail not at your peril. Given under our hands and seals the — day of —, 1843.

[*Signed and sealed by commissioners.*]

To J. K., L. M., etc.

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No. 423.

*Oath to jurors on execution of commission.*

See ante, p. 232.

You shall well and truly inquire touching the lunacy [*or idiocy, or habitual drunkenness,*] of J. D., and of all such matters and things as shall be given you in charge, by virtue of a commission issued out of and under the seal of the court of chancery, to inquire into his said lunacy, [*or idiocy, etc.*] and now here to be executed, and a true inquisition make, according to evidence, so help you God.

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[\*VOL. II, 658]

\*No. 424.

*Oath to witnesses.*

See ante, p. 232.

The evidence you shall give touching the lunacy [*or idiocy, or habitual drunkenness,*] of J. D., and as to who are his next of kin, and the nature, extent and value of his real and personal estate, and all such other matters and things as shall be required of you, by virtue of a commission issued out of the court of chancery, to inquire into the said lunacy, [*or idiocy, etc.*] and now here to be executed, shall be the truth, the whole truth, and nothing but the truth, so help you God.

## No. 425.

*Inquisition.*

See ante, p. 233.

An inquisition taken at the house of —, in the town of Wilton, in the county of Saratoga, on the — day of —, in the year of our Lord one thousand eight hundred and forty-three, before H. R., J. A. C. and L. E., commissioners appointed by virtue of a commission in the nature of a writ *de lunatico* [*or idiota*] *inquirendo*, issued out of and under the seal of the court of chancery of the State of New York, bearing date the — day of —, 1843, to them, the said commissioners, directed to inquire, among other things, of the lunacy [*or idiocy*] of J. D. upon the oaths of [*insert names of the jurors,*] good and lawful men of the said county, who being summoned, sworn and charged upon their oath, say that the said J. D., at the time of taking this inquisition, is a lunatic and of unsound mind, and does not enjoy lucid intervals, [*or is an idiot,*] so that he is incapable of the government of himself, or of the management of his lands, tenements, goods and chattels; and that he has been in the same state of lunacy [*or idiocy*] for the space of two years last past and upwards; [*or, in case of idiocy, from his nativity,*] (\*) that the said J. D. hath, from his infancy, been subject to fits, which may have been the occasion of his lunacy, but how otherwise he became a lunatic, the jurors aforesaid know not, unless by the visitation of God.<sup>(a)</sup> And the jurors aforesaid, upon their oath [\*VOL. II, 659] \*aforesaid, further say that whether the said J. D. being in that state, hath alienated any lands and tenements, or not, the jurors aforesaid know not, [*or, that the said J. D. being in that state, did, on or about the — day of —, 1842; at —, by a warranty deed, sell, alien, and convey unto R. S. of, etc., a certain house and lot situate in the city of Albany, being, etc. which came to him by descent from his father, for the nominal consideration of \$—, but that the actual amount received by the said J. D. for said house and lot was only about \$—, which was less than a third of the value thereof; the same being worth at least \$—.*] And the jurors aforesaid, on their oaths aforesaid, do further say that the following lands and tenements, goods and chattels, yet remain to him, the said J. D., to wit, [*describe his property;*] and that the said lands and tenements now belonging to said J. D. are worth about \$—, and that the issues and profits thereof,

(a) The above sentence, from the (\*) will be omitted in a case of idiocy.

by the year, are worth about the sum of \$——. And further, that the value of the goods, chattels, and personal estate of the said J. D. is about the sum of \$——. And the jurors aforesaid, do further say that C. H., the wife of G. H., of, etc., is the sister of the said J. D., and that she is, at the time of taking this inquisition, of the age of 30 years, or thereabouts; and that R. D. of, etc. is the brother of the said J. D., and is at the time of taking this inquisition, of the age of 27 years, or thereabouts; that the said C. H. and R. D. are the nearest heirs of the said J. D., and will be entitled to his estate, in equal proportions, in case of his death.

In testimony whereof, as well the said commissioners as the jurors aforesaid, have to this inquisition, set their hands and seals, the day and year first above written.

[Names and seals of commissioners.]

[Names and seals of jurors.]

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No. 426.

*Notice of application to confirm finding of jury.*

See ante, p. 234.

[As in No. 249 to the (\*), then,] that the finding of the jury upon the commission heretofore issued in the above matter be confirmed; and that at the same time a petition with a copy of which you are herewith served, will be presented to the court, and a motion made that the prayer thereof be granted; and for such further, or for such other order or relief as the court may think proper to grant. Which motion [\*VOL. II, 660] \*will be founded on the said commission, the return thereto, and the inquisition taken under such commission; together with the petition above mentioned.

Dated, etc.

To W. R., [*the person*  
*opposing the application.*]

Yours, etc.

W. C. N., Sol. for pet'r.

## No. 427.

*Petition for appointment of committee.*

See ante, p. 235.

[*Title and address as in No. 411.*]

The petition of R. D., of, etc., and C. H. the wife G. H., of, etc., respectfully showeth—that the commission in the nature of a writ *de lunatico* [*or idiota*] *inquirendo* heretofore issued out of this court in pursuance of an order thereof made on the —— day of ——, directed to certain commissioners therein named to inquire of the lunacy [*or idiocy*] of J. D., of, etc., who is the brother of your petitioners, has been duly executed and returned by the said commissioners, and filed in the office of the clerk of this court. That from the inquisition annexed to the said commission, and returned therewith, it appears that the jury have found the said J. D. is a lunatic, and of unsound mind, and does not enjoy lucid intervals, [*or that he is an idiot*] so that he is incapable of the government of himself or of the management of his lands, tenements, goods and chattels; as by the said inquisition will more fully appear.

Your petitioners therefore pray that they may be appointed the committee of the person and estate of the said J. D., upon their giving security for the faithful performance of their trust as such committee, according to the statute, and in conformity with the rules and practice of this court; [*or that it be referred to one of the masters of this court residing in the county of Saratoga, to inquire and report who is a suitable and proper person to be appointed the committee of the person and estate of the said J. D., and to approve of the bond and sureties offered by him; such bond to be in the penalty of double the value of the property of the said J. D., as found by the inquisition; and that he cause notice to be given to L. M. and R. S., the next of kin of the said J. D., of the time and place of executing the said reference.*] And for such other or further relief in the premises as shall be just.

And your petitioner, etc.



[\*Vol. II, 661]

\*No. 428.

*Order confirming finding of jury, and appointing committee.*

See ante, p. 235.

At, etc. [as in No. 255.]

[Title.]

On reading and filing the inquisition in this matter, taken under and by virtue of the commission heretofore issued out of this court, from which it appears that the jury have found the said J. D. is a lunatic, and of unsound mind, and does not enjoy lucid intervals [or that he is an idiot] so that he is incapable of the government of himself, or of the management of his lands, tenements, goods and chattels, and that he is seized and possessed of certain real and personal estate in the said inquisition specified, on motion Mr. W. C. N., solicitor for R. D. and C. D., and on hearing Mr. W. in opposition thereto, ordered that the finding of the jury upon the execution of the said commission, as set forth in the said inquisition, be, and the same is hereby confirmed. And on reading and filing the petition of R. D., and C. H. the wife of G. H., the brother and sister of the said J. D., duly verified, praying for the appointment of a committee of the person and estate of the said J. D., it is, on like motion, ordered (\*) that the said R. D. and C. H. be, and they are hereby appointed the committee of the person and estate of the said J. D., upon their giving a bond, with two sufficient sureties, to be approved of by a master of this court, in the penalty of double the value of the property of the said J. D., as found by the said inquisition, conditioned for the faithful performance of their trust as such committee according to the statute, and to account whenever required, in conformity with the rules and practice of this court.

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 No. 429.
*Order confirming finding of jury, and directing a reference to a master to report a suitable person as committee.*

See ante, p. 236.

[As in last form to the asterisk (\*)—then as follows] that it be referred to one of the masters of this court residing in the county of Sara-

toga, to inquire and report who is a suitable and proper person to be appointed the committee of the person and estate of the said J. D., [\*Vol. II, 662] and to \*inquire and report as to the form and penalty of the bond to be given by such committee, and as to the sufficiency of the sureties offered by him. And that the said master cause — days notice, in writing, to be given to L. M. and R. S., the next of kin of the said J. D., of the time and place of executing the said reference; and that he report hereon with all convenient speed.

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No. 430.

*Master's report on a reference to nominate a committee, etc.*

See ante, p. 236.

[*Title.*]

To the Chancellor of the State of New York.

In pursuance of an order of this court made in the above matter, on the — day of — last, directing a reference to one of the masters of this court residing in the county of Saratoga, to inquire and report who is a suitable and proper person to be appointed the committee of the person and estate of the said J. D., and to inquire and report as to the form and penalty of the bond to be given by such committee, and as to the sufficiency of the sureties offered by him; and by which the master was directed to cause — days notice in writing to be given to L. M. and R. S. the next of kin of the said J. D., of the time and place of executing the said reference—

I, the subscriber, one of the masters of this court, residing in the county of Saratoga, to whom the execution of the said order was confided, do report—that having caused — days notice in writing to be given to L. M. and R. S., of the time and place of executing the said reference, I did, on the — day of — proceed to execute the said order of reference, in the presence of W. C. N., the solicitor for the petitioner in this matter, and R. D.; the said L. M. and R. S. not attending. That having made the necessary inquiries I am of opinion that R. D., of, etc., the brother of the said J. D., is a suitable and proper person to be appointed the committee of the said J. D. That the said R. D. proposes to give a bond in the penalty of \$—, being double the value of the property of the said J. D. as found by the inquisition of the jury, conditioned for the faithful performance of his

trust as such committee, according to the statute, and to account whenever required, in conformity with the rules and practice of this court. And I do further report that the said R. D. offers as his sureties J. M. [\*VOL. II, 663] and N. O., of, etc.; and \*having taken from each of them an affidavit as to his sufficiency, and made inquiries relative thereto, I am satisfied that the sureties so offered are sufficient; each being worth the sum of \$—— over and above all his debts. And that I have indorsed upon such bond my approval of its form and manner of execution.

All which is respectfully submitted.

Dated, etc.

W. A. D., Master in chancery.

No. 431.

*Order confirming master's report and appointing committee.*

See ante, p. 237.

At, etc. [*as in No. 255.*]

[*Title.*]

On reading and filing the report of W. A. D., one of the masters of this court, bearing date the —— day of —— instant, made in pursuance of an order of this court dated the —— day of —— last, and on motion of W. C. N., solicitor for the petitioner in this matter, ordered that such report be and the same is hereby confirmed. And it is further ordered, that R. D., in the said report mentioned, be and he is hereby appointed the committee of the person and estate of the said J. D., upon his executing to the people of this State the bond in the said report mentioned, together with his sureties, and upon his and their acknowledging such bond, and filing the same in the office of the clerk of this court. And it is further ordered, that upon the filing of such bond a commission may be issued to such committee, under the seal of this court.

No. 432.

*Bond of committee.*

Know all men by these presents, that we, R. D., of, etc., and J. M. and N. O., of the same place, are held and firmly bound unto the peo-

ple of the State of New York in the penal sum of \$——, [*continue as in No. 396 to the (†), then proceed as follows,*] R. D. was appointed committee of the person and estate of the above named J. D., who, by an inquisition taken under a commission issued out of said court, had previously thereto been found to be a lunatic, upon his giving the bond required by the said order.

Now therefore, the condition of this obligation is such, that if the above bounden R. D. shall faithfully perform the trust reposed in him [\*VOL. II, 664] \*as such committee, according to the statute, and shall render an account whenever required, in conformity with the rules and practice of the said court of chancery, and shall observe the orders and directions of the said court in relation to such trust, then this obligation to be void, etc. [*conclude as in No. 396.*]

[*Acknowledgment and approval—see No. 396.*]

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No. 433.

*Commission to committee.(a)*

See ante, p. 237.

The People of the State of New York: To all to whom these [L. s.] presents shall come, greeting. Whereas, by a certain inquisition taken at the town of Wilton, in the county of Saratoga, on the —— day of ——, 1843, by virtue of our commission in the nature of a writ *de lunatico* [*or idiota*] *inquirendo*, in that behalf duly made and issued, to inquire, among other things, of the lunacy [*or idiocy*] of J. D., of, etc. it is found, amongst other things, that the said J. D., at the time of taking the said inquisition, was a lunatic not having lucid intervals, [*or an idiot* ;] so that he was incapable of the government of himself, or of the management of his lands, tenements, goods, and chattels; as by the said inquisition remaining of record in our court of chancery may more fully appear; for the care and custody of whom, and for the management of whose estate it belongs to us, in our court of chancery, to provide. And whereas, sufficient security is given to us on behalf of the said J. D. by R. D. of, etc. as is customary in such

(a) There are some advantages arising from the taking out of a commission. Being under the seal of the court of chancery it will be legal evidence in all courts, of the rights of the committee, without any thing further; but the order appointing him would not show his rights, without the introduction of the prior proceedings to lay a foundation for it. Chancellor Walworth recommends the taking out of a commission, in all cases.

cases: Now therefore, know ye, that we have given, granted, and committed, and by these presents do give, grant, and commit unto the said R. D. the care and custody of the person, and the possession, care, and management of the estate, as well real as personal, of the said J. D. during our pleasure, to be signified in our court of chancery. And the said R. D. is hereby required, within six months from the date of these presents, to return and file in the office of the clerk of our court [\*VOL. II, 665] of \*chancery of the fourth circuit, a just and true inventory, under oath, of the whole real and personal estate of the said J. D., stating the income and profits thereof, and the debts, credits and effects of the said J. D. so far as the same shall have come to the knowledge of the said R. D., and that out of the said estate, or the rents, issues and profits thereof, he provide for the maintenance, sustenance and support of the said J. D. and his family; and that annually thereafter the said R. D. file in the office of the said clerk a similar inventory, and an account, under oath, of the management of his said trust, and of any other property or effects belonging to the said estate, which he shall have since discovered, as required by the 154th rule of our court of chancery. And the said R. D. is further required to abide by and obey all and every such order or orders in the premises as may hereafter be made in our said court of chancery, and to render a full and just account of the execution of the said trust, and of the estate, property and effects which shall have come to his hands, when and as often as required by our said court. Witness, Reuben H. Walworth, chancellor of our said state, at the town of Saratoga Springs, the first day of January, one thousand eight hundred and forty-four.

W. C. N., Solicitor.

G. M. D., Clerk.

(*Indorsed*) "By the Court."

G. M. D., Clerk.

No. 434.

*Petition by lunatic to supersede the commission, on his recovery.*

See ante, p. 239.

IN CHANCERY.

Before, etc.

In the matter of J. D. a lunatic.	}
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To the Chancellor of the State of New York.

The petition of the above J. D. respectfully sheweth, that on the — day of —, 1840, a commission in the nature of a writ *de lunatico inquirendo*, issued out of this court against your petitioner; and on the — day of — following, an inquisition was taken under the same, whereby your petitioner was duly found to be a lunatic, and your petitioner's brother R. D. was subsequently appointed by this court, committee of his person and estate.

That your petitioner having perfectly recovered his sound state of [\*VOL. II, 666] \*mind and understanding, for twelve months past, is desirous that the said commission of lunacy should be now superseded; and that the costs of suing out the said commission of lunacy, and also the costs of the committee and next of kin may be allowed.

Your petitioner therefore prays that he may be at liberty to attend in open court, or before a master, for the purpose of being examined as to his sanity of mind, and competency of understanding, for the management of his person and estate; and that the said commission, inquisition and proceedings therein, may be superseded forthwith; and that a supersedeas may issue for that purpose. Or for such further or other order in the premises as to your honor shall seem meet, and this case may require.

And your petitioner, etc.

J. D.

[*Jurat.*]

No. 435.

*Affidavits in support of petition to supersede commission.*

See ante, p. 239.

[*Title.*]

Saratoga county, ss. R. D., of, etc., the committee of the above J. D., being duly sworn says, that about a year since the said J. D. was happily restored to a state of convalescence; and that soon afterwards deponent resigned the management of his affairs into the hands of the said J. D., and that from that time to the present, he has uniformly and constantly shown himself to be in his perfect senses, and has now the management of his own affairs, which he conducts most regularly and with great precision. And this deponent further says, that from the time last mentioned to the present time, the said J. D. has at all times appeared to be perfectly rational and free from any symptom of derangement; and that at this time deponent believes him to be of good and perfect sound mind, memory and understanding.

Sworn, etc.

R. D.

[*Title.*]

Saratoga county, ss. C. C. of, etc., doctor of physic, being duly sworn, says that he knows the said J. D. above named and described, and has known him for upwards of — years. That he heard he was afflicted with insanity about two years ago, but that he was happily restored to a convalescent state about a year since. And deponent further says that he has seen the said J. D. many times during the past year, and that he never betrayed any symptom of insanity. And that [\*Vol. II, 667] \*he this deponent, saw the said J. D. on the — day of — instant; when this deponent did not discover in him the slightest symptom of insanity or unsoundness of intellect; and that this deponent verily believes the said J. D. to be of perfect sound mind, memory and understanding.

Sworn, etc.

C. C.

## No. 436.

*Order to supersede commission.*At, etc. [*as in No. 255.*][*Title.*]

On reading and filing the petition of the above J. D., dated the — day of —, setting forth that he has perfectly recovered his sound state of mind and understanding, for twelve months past, and praying that the commission, inquisition, and proceedings in the above matter may be superseded; and on reading and filing the affidavits of R. D. and C. C., in support of said petition; and upon examining the said J. D. in open court as to his sanity of mind and competency of understanding; on motion of Mr. H., solicitor for the said J. D., it is ordered that the commission of lunacy issued against the said J. D., and the inquisition taken thereon, be forthwith superseded and determined.

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 No. 437.
*Supersedes of a commission of lunacy.*

The People of the State of New York. To all to whom [L. s.] these presents shall come, greeting: Whereas, by a certain inquisition taken at —, on the — day of —, 1842, by virtue of our commission in the nature of a writ *de lunatico inquirendo* in that behalf duly made and issued, to inquire, among other things, of the lunacy of J. D., it was found, amongst other things, that the said J. D. was, at the time of taking the said inquisition, a lunatic, and did not enjoy lucid intervals, so that he was not capable of the government of himself, or of the management of his lands, tenements, goods and chattels; as by the said inquisition, remaining on record, will more fully appear. And whereas, by our commission issued out of and under the seal of our said court of chancery, bearing date the 1st day of January, one thousand eight hundred and forty-four, sufficient security having \*been given, for the benefit of the said J. D., by R. D., of, etc. as is customary in such cases, we did give, grant, and commit unto the said R. D., the care and custody of the person, and the possession, care, and management of the estate,



as well real as personal, of the said J. D., during our pleasure, to be signified in our court of chancery; as by the said commission, remaining as of record will, among other things, more fully appear. But because, upon full examination in our court of chancery before us had in this behalf, it sufficiently appears to us that the said J. D. is recovered of his lunacy aforesaid, and restored to his right mind, memory and understanding, so that he is capable of governing himself, and of managing his lands, tenements, goods, and chattels, and we in this behalf being willing that what is just and right be done to the said J. D. *Know ye therefore*, that we, for and in consideration that the said J. D., now is not a lunatic, but of sound mind, sane memory and understanding, and for divers other good causes and considerations, us in this behalf especially moving, have superseded and determined, and by these presents do supersede and determine the aforesaid commission in the nature of a writ *de lunatico inquirendo*, and all process thereupon made, and also the commission to the said R. D., and all and singular the grants and powers in the said commission specified and contained, to all intents and purposes whatsoever; and all and singular the same we annul and make void by these presents; and also the aforesaid R. D., from the care, custody and government of the person of the said J. D., and from the possession, care, and management of the estate as well real as personal of the said J. D., we fully discharge by these presents—requiring that the said R. D. shall by no means suffer any person or persons to intermeddle touching the said J. D., or his estate, for the future. And the said J. D. to the regimen and government of himself, and all his, we fully restore by these presents. Witness, etc. [*as in No. 433.*]

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No. 438.

*Petition for sale of lunatic's estate to pay debts.*

See ante, p. 242.

[*Title.*]

To the Chancellor of the State of New York.

The petition of R. D., the committee of the person and estate of the above named lunatic, respectfully showeth, that by an order of this court made on the — day of — last, your petitioner was appointed such [\*Vol. II, 669] \*committee. That as such committee he has duly

made out and verified an inventory of the estate of the said J. D., real and personal, and has therein stated the value thereof, and the amount of the rents and profits of the said real estate, and of the debts owing by the said lunatic; a copy of which inventory is hereto annexed. That it appears from the said inventory, that the said real estate consists of a house and lot, situate in the city of Albany, being No. —, etc., of the value of about \$—, and which rents for the sum of \$— annually. That the value of the said personal estate is about \$—, and consists of the articles specified in said inventory. That the value of the said personal estate at the time of your petitioner's appointment was about \$—, but that your petitioner has been obliged to sell the following articles, viz.: [*specify them,*] and apply the proceeds to the payment of debts owing by the said lunatic, to wit: a debt of \$—, due to W. S., for medical attendance, and a debt of \$—, due to T. R., for boarding said lunatic; and the sum of \$— for the costs of the proceedings in this matter, to his solicitor.

Your petitioner further shows, that the following is an account of the debts and demands now existing against the estate of the said lunatic, viz.: [*set forth a list of the debts, with their amounts.*] That the aggregate amount of such debts and demands is \$—, as near as can be ascertained; for the payment of which, in addition to the expenses of supporting such lunatic, the income of his real and personal estate is wholly inadequate, and that even his whole personal estate would not be sufficient to discharge the same, were it sold for that purpose.

Your petitioner therefore prays, that by an order of this court, he may be authorized and empowered to mortgage, or sell, so much of the real estate of the said lunatic, as may be necessary for the payment of his debts.

And your petitioner, etc.

R. D.

[*Jurat.*]

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No. 439.

*Order of reference on No. 438.*

See ante, p. 242.

At, etc. [*as in No. 255.*]

[*Title.*]

On reading and filing the petition of R. D., the committee of the above lunatic, duly verified, dated the — day of —, praying for

authority to mortgage, or sell, so much of the real estate of the said J. D., as may be necessary for the payment of his debts, and on motion [\*VOL. II, 670] \*of S. S., of counsel for the petitioner, ordered that it be referred to one of the masters of this court, residing in the county of —, to inquire into, and report upon the matters in the said petition contained, and to inquire into the truth of the representations made therein, to hear all the parties interested in such real estate, and to report to this court, with all convenient speed, whether the personal estate of the said J. D. is sufficient for the payment of his debts; and whether a mortgage or sale of the real estate of the said lunatic, or any part thereof, is necessary for that purpose, and if so, which would be most advantageous to the said lunatic; and whether a sale or mortgage of the whole, or only a part, of said premises is necessary; and if only a part thereof is required to be mortgaged or sold, that he specify what particular part thereof can be so disposed of, with the least injury to the interests of the said J. D.

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No. 440.

*Master's report as to necessity of sale, etc.*

See ante, p. 242.

[*Title.*]

To the Chancellor, etc.:

In pursuance of an order of this court, made in the above matter on the — day of — last, I, the subscriber, one of the masters of this court, residing in the county of —, to whom the execution of the said order was confided, do report:

That having given — days notice in writing to S. T. and L. N., of, etc., who are the next of kin of the said lunatic, and would be his heirs at law, were he to die intestate, and having been attended by the solicitor for the said committee, and by the said J. D.—the said S. T. and L. N. failing to appear—I proceeded to make the inquiries directed by the said order. That from the evidence produced before me, I am satisfied that the facts stated in the petition of R. D., the committee, are true. That I have ascertained the value of the personal estate now owned by the said lunatic, to be \$—; the principal part of the personal estate originally belonging to the said lunatic, having been already applied to his support and maintenance, and the

payment of debts owing by him; and that the personal property now remaining is insufficient for the payment of his debts, and that it is not advisable the same should be sold; inasmuch as what now remains thereof is needed upon the farm and in the house of the said lunatic, for the use of his family, and were it sold, it would have to be replaced, at a sacrifice and loss to the estate. That the debts owing by the said [\*Vol. II, 671] lunatic amount to the sum of \$—, and \*are due to the following persons: \$100 to H. R., for the support and maintenance of the lunatic; \$50 to W. S., for medical attendance, etc., etc. That a sale of a portion of the real estate of the said lunatic is necessary for the payment of those debts, and that such sale would be preferable to a mortgage. That the part thereof which can be disposed of with the least injury to the interests of the said lunatic, is the tract of woodland situate in the town of —, consisting of about — acres, which is estimated to be worth about \$—, and that in my opinion the said tract would bring that sum at least, on a sale thereof; which would be sufficient to pay all the debts of the said lunatic.

All which is respectfully submitted.

Dated, etc.

F. M., Master in chancery.

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No. 441.

*Order to confirm master's report, and authorizing committee to contract for a sale.*

See ante, p. 242.

At, etc. [as in No. 255.]

[*Title.*]

On reading and filing the report of F. M., one of the masters of this court residing in the county of —, made in the above matter, bearing date the — day of — instant, and on motion of Mr. S. S., solicitor for the petitioner R. D., ordered that the said report be and the same is hereby confirmed. And it appearing to the court from the said report, and from an examination of the matter, that the personal estate belonging to the said lunatic is insufficient for the payment of his debts, and that the same has been applied for that purpose as far as the circumstances of the case rendered proper; that the debts now owing by the said lunatic amount to the sum of \$—; and that

a sale of a portion of the real estate of the said lunatic is necessary for the payment thereof, it is further ordered that the said R. D., committee of the said lunatic, be and he is hereby authorized, empowered, and directed to sell, at public or private sale, subject to the approbation of this court, the tract of wood land belonging to said lunatic which is specified in such report, for the purpose of paying and discharging the debts of the said lunatic. And that before any contract or deed shall be executed, the terms of such sale or sales shall be reported by the said committee, on oath, to this court.

[\*VOL. II, 672]

\*No. 442.

*Report of sale by committee.*

[Title.]

To the Chancellor, etc.

In pursuance of an order of this court, made in the above matter on the — day of — instant, authorizing and empowering, and directing me to sell, at public or private sale, subject to the approbation of this court, the tract of land therein specified, for the purpose of paying and discharging the debts of the said lunatic, and directing me to report the terms of such sale or sales to this court, on oath, before any contract or deed should be executed.

I, the subscriber, the committee of the said lunatic, do respectfully report: That I have entered into an agreement, subject to the approbation of this court, with N. F. of, etc. for the sale to him of the tract of wood land specified in the said order, at and for the price or sum of \$—, to be paid on the delivery of the deed therefor; which sum is the highest price that could be obtained for the said tract of land. And I do further report, that pursuant to previous public notice given by me for that purpose, for the space of — weeks, I did, on the — day of — instant, at, etc. sell at public auction to R. C. of, etc. the improved farm mentioned in said order, situate in the town of —, for the price or sum of \$—, that being the highest sum bid therefor; and that by the terms of the said sale the purchase money is to be paid on the delivery of the deed.

All which, etc.

R. D., Committee.

[Jurat—see Jurat to No. 400.]

## No. 443.

*Order confirming sale and directing the execution of conveyance.*

See ante, p. 243.

At, etc. [*as in No. 255.*]

[*Title.*]

On reading and filing the report of R. D., the committee of the person and estate of the said lunatic, made upon oath and dated the — day of — instant, stating that in pursuance of the order of this court dated the — day of —, he had entered into agreements, subject to the approbation of this court, with N. F. and R. C., for the sale to them respectively of the tracts or parcels of land therein mentioned, belonging to the said lunatic, for the prices or sums mentioned [\*VOL. II, 673] in the \*said report, and that the purchase money of each of said parcels is payable on the delivery of the deed therefor; on motion of Mr. S. S., solicitor for the said committee, ordered that the said report and the agreements therein mentioned be and the same are hereby ratified and confirmed. And it is further ordered that the said committee do execute, acknowledge, and deliver to each of the said purchasers a good and sufficient conveyance of the tract or lot of land purchased by him, upon receiving the purchase money agreed to be paid therefor. And that the said committee apply the net proceeds of the said sales, after deducting the costs of the proceedings in this matter to be taxed, and the other necessary expenses of effecting the said sales, to the payment and discharge of the debts of the said lunatic which are specified in the report of P. G. the master, bearing date the — day of — last.

[*If additional security is required to be given by the committee, add*] And it is further ordered that the said committee shall give additional security, by a bond in the penalty of \$—— with two sufficient sureties, to be approved of by one of the masters of this court, and filed with the clerk, conditioned for the faithful application of and accounting for, the proceeds of said sales, before he shall receive such proceeds from the purchasers.

## No. 444.

*Deed by committee of lunatic.*

See ante, p. 243.

This indenture, made the — day of —, 1844, between R. D., of, etc., committee of the person and estate of J. D., a lunatic, of the first part, and N. F., of, etc., of the second part. Whereas, by an order of the court of chancery of the state of New York, made on the — day of — last, reciting that it appeared to the said court, that the personal estate of the said J. D. was insufficient for the payment of his debts, and that a sale of a portion of the real estate of the said lunatic was necessary for the payment thereof, said R. D. as such committee was, among other things, authorized, empowered and directed to sell, at public or private sale, subject to the approbation of the court, the tract of woodland belonging to said lunatic specified therein, for the purpose of paying and discharging the debts of the said lunatic, and to report the terms of the sale or sales made by him, to the court, on oath, before any contract or deed should be executed. And whereas the said R. D., as such committee, having in pursuance of said order, [\*VOL. II, 674] on the — day of \*—, made his report to the court, on oath, stating that he had entered into an agreement, subject to the approbation of the court, with N. F., of, etc., for the sale to him of the said tract of woodland at and for the price or sum of \$—, to be paid on the delivery of the deed therefor. And whereas by another order of the said court dated the — day of —, it was ordered that the said report and the said agreement be ratified and confirmed, and that the said committee should execute, acknowledge, and deliver to the said N. F. a good and sufficient conveyance of the tract of land so purchased by him, upon receiving the purchase money agreed to be paid therefor—

Now therefore this indenture witnesseth that the said party of the first part, committee as aforesaid, by virtue of the power and authority conferred upon him by the several orders above mentioned, and in pursuance of the statute in such case made and provided, for and in consideration of the sum of \$—, the said purchase money, to him in hand paid at or before the ensembling and delivery of these presents, by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, sold, remised, released and conveyed, and by these presents doth grant, bargain,

sell, remise, release and convey unto the said party of the second part, his heirs and assigns forever, all the right, title, and interest of the said lunatic of, in and to [*conclude as in No. 404 from the asterisk (\*)*.] (a)

(a) The proceedings upon a petition for a sale of a lunatic's estate for his *support and maintenance*, are similar to those on a sale to pay debts. The preceding forms can therefore be easily varied so as to apply to applications of the former kind.



## CHAPTER VII.

## BILLS FOR DIVORCE.

No. 445.

*Bill to dissolve marriage because of non-age.*

See ante, p. 246.

[Commence as in No. 1, ante, p. 353.] Your orator A. B., son of J. B., of the city of Utica, physician, an infant under the age of twenty-one years, to wit, of the age of about fifteen years, by his father and [\*VOL. II, 675] \*next friend. That on or about the — day of —, in the year one thousand eight hundred and forty-three, your orator intermarried with one S. D., (now S. B.,) at the town of —, in the county of Oneida; and that at the time of the said marriage your orator and the said S. B. were, and now are, inhabitants of this state.

And your orator further showeth that at the time of his said marriage he was an infant under the age of legal consent, to wit, of the age of about thirteen years, and was therefore incapable of contracting marriage, and the said S. D. was of the age of about — years.

And your orator further showeth that for a short time after the said marriage, he cohabited with his said wife, but they have not cohabited as husband and wife for any time, or in any manner, since he your orator attained the age of consent, that is to say the age of fourteen, which was on the — day of — last.

And your orator (\*) further showeth that he is desirous of having the said marriage between him and the said S. D. dissolved and declared null and void by a decree of this court.

In tender consideration whereof, and forasmuch as your orator is remediless in the premises, at and by the strict rules of the common law, and is only relievable in a court of equity, where matters of this nature are properly cognizable and relievable; to the end therefore that the said S. B. may upon her corporal oath, full, true, direct and perfect answer make to all and singular the premises, and that as fully and particularly as if the same were here again repeated and she

thereto particularly interrogated ; and that the said marriage between your orator and the said S. B. may be dissolved and declared null and void by a decree of this court, according to the statute in such case made and provided. And that your orator may have such further relief, or such other relief in the premises as shall be equitable and the circumstances of this case may require.

May it please your honor [*prayer for subpoena, as in No. 1.*]

C. M. D., Sol. for com'pt.

A. B.

R. E., of counsel.

[*Jurat.*]

No. 446.

*Bill to dissolve marriage because of lunacy.*

See ante, p. 248.

[*Commence as in No. 1.*] Your orator A. B., of, etc. That on or [\*Vol. II, 676] \*about the — day of —, in the year one thousand eight hundred and forty, your orator intermarried with one C. D. (now C. B.) at —, in the county of —; and that at the time of the said marriage your orator and the said C. B. were, and ever since have been and now are, inhabitants of this state.

And your orator further showeth unto your honor that about a year previous to the said marriage, and on or about the — day of —, your orator had, by an inquisition of a jury taken under and by virtue of a commission in the nature of a writ *de lunatico inquirendo*, issued out of this court, upon the petition of your orator's brother J. B., for that purpose, been found to be a lunatic and of unsound mind, not having lucid intervals, and that he was incapable of the government of himself or of the management of his lands, tenements, goods, or chattels; and that he had been in that state for about two years.

And your orator further showeth that upon the return of the said inquisition to this court, an order was entered on the — day of —, confirming the finding of the jury in the said inquisition, and appointing your orator's brother J. B. the committee of his person and estate; as by the said petition, commission, orders, and other proceedings in the said matter, now remaining as of record in this court, will more fully appear.

And your orator further showeth that from the time of taking the inquisition aforesaid, until the said marriage of your orator, and until long afterwards, he was a lunatic, and of unsound mind, and incapable of contracting matrimony. And your orator charges that at the time the said marriage took place, it was well known to the said C. that your orator was a lunatic under the care of his said committee, and that he was incompetent to consent to such marriage. That the said C. had been a near neighbor of your orator for several years, and had notice not only of his mental incapacity, but of all the proceedings under the commission of lunacy above mentioned.

And your orator further showeth that the said marriage took place and was entered into, without the knowledge or consent of your orator's said committee.

And your orator further showeth that he is now perfectly recovered of his lunacy aforesaid, and restored to his right mind, memory, and understanding, and has been so for about — months last past; and that by an order of this court made upon the petition of your orator, on the — day of — last, the commission of lunacy issued against him as aforesaid, and the inquisition taken thereon were superseded [\*VOL. II, 677] and \*determined, and your orator was discharged from the care, custody, and government of his said committee.

And your orator further showeth that since his restoration to a sound state of mind, as aforesaid, he has not voluntarily, nor in any manner, cohabited with the said C. That your orator is advised that the marriage had and solemnized between him and the said C. as aforesaid, is under the circumstances attending the same, invalid and null, but that it is necessary the same should be dissolved and declared null and void by a decree of this court.

In tender consideration whereof [*conclude as in last form.*]

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No. 447.

*Bill to dissolve marriage because of physical incapacity.*

See ante, p. 249.

[*Commence as in No. 1,*] your orator A. B., of, etc. That on or about the — day of —, in the year one thousand eight hundred and forty-two, your orator intermarried with one C. D. (now C. B.) at —

in the county of —; and that at the time of the said marriage your orator and the said C. were, and ever since have been, and now are inhabitants of this State.

And your orator further showeth unto your honor, that immediately after the said marriage took place your orator discovered that the said C., at the time of her intermarriage with your orator, as aforesaid, was physically incapable of entering into the marriage state; that the uterus and vagina of the said C. were, at the time of such intermarriage, and for a long time previous thereto had been, in a diseased, and in schirrhous, cartilaginous, and ulcerated state; and were unnaturally thickened and indurated, so that the said marriage could not be consummated by the sexual intercourse of the parties.

And your orator further showeth unto your honor, that for about six years next preceding the said marriage with your orator, the said C. had been a widow, during all which period of time, as your orator has been informed and believes, the said diseased state of the said C. existed, and was increasing and progressing; and that the physical incapacity of the said C., arising from the diseased condition of the parts aforesaid, was well known to her at the time of her said intermarriage with your orator and for a long time previous thereto. That your orator having been informed that during a portion of her widow-  
[\*VOL. II, 678] hood as aforesaid she, the \*said C., had been in ill health, he did immediately previous to such marriage, and before finally determining to marry her, inquire of her if there existed any impediment to the marriage with your orator, on account of her ill health, and was then informed by her that there was no such impediment; which statement your orator charges was untrue and was well known by the said C. to be untrue, at the time it was so made.

And your orator further showeth unto your honor, that as he has been informed and believes the said physical incapacity of the said C. still exists and is incurable, and he so charges the fact to be.

And your orator further showeth, that after your orator had discovered the state and condition of body of the said C. to be as above stated, and within about eight months after the said intermarriage, your orator informed her that he would not continue to live with her, in consequence thereof; and that out of regard to the feelings of the said C., and for the purpose of saving the necessity of filing this bill of complaint, your orator endeavored to make an amicable arrangement with her by which she and your orator should live separate and apart from each other. And that, with the same view, your orator has

repeatedly endeavored to make such an arrangement, but has not been able to induce the said C. to consent thereto.

All which actings and doings of the said C. are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator.

And your orator [*conclude as in No. 445, from the asterisk(\*)*.]

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No. 447.

*Order of reference on bill to dissolve marriage because of non-age, idiocy or lunacy, or force, or fraud.*

See ante, p. 251.

At, etc. [*as in No. 255.*]

[*Title.*]

On reading and filing due proof that the bill of complaint in this cause has been taken as confessed by [*or the facts charged in the bill of complaint in this cause having been admitted by the answer of*] the defendant, and on reading and filing the (\*) affidavits required by the 164th and 165th rules of this court, on motion of E. H. R., solicitor for complainant, ordered that it be referred to one of the masters of [\*VOL. II, 679] \*this court residing in the county of —, to take proof of the material facts charged in the said bill, and to report such proof to the court, with his opinion thereon.

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No. 448.

*Notice of motion for order of reference on bill to dissolve marriage because of physical incapacity.*

[*As in No. 249 to the (\*), then continue thus*] that this cause be referred to one of the masters of this court residing in the county of — to take proof of the facts charged in the bill of complaint filed therein, and directing the master to whom said matters may be referred, to examine the defendant on oath as to the several matters set forth in said bill of complaint; and directing the defendant to submit herself

to such surgical examination, and examination by matrons as the said master may direct, for the purpose of ascertaining the truth of the matters set forth in the said bill of complaint; and for such other [*conclude as in No. 249.*]

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No. 449.

*Order of reference on bill to dissolve marriage, because of physical incapacity.*

See ante, p. 250.

[*As in No. 447 to the (\*), then as follows.*] Affidavit of regularity required by the 164th rule of this court, on motion of E. H. R., solicitor for complainant, ordered that it be referred to one of the masters of this court, residing in the county of —, to take proof of the material facts charged in the said bill, and to report such proof to the court, with his opinion thereon. And it is further ordered, that the said master inquire and report whether the defendant, at the time of the solemnization of the marriage with the complainant, was physically incapable of entering into the marriage state, and whether she is still incapable of consummating the marriage contract, by reason of her incurable impotence. That the said master examine the defendant on oath, as to the several matters alleged in the bill; and that the defendant submit herself to such surgical examination, and to such examination by matrons as the said master may think proper to direct, [\*VOL. II, 680] for the purpose of ascertaining \*the fact of her alleged impotence; but that no person shall be present at any such examinations, except the surgeons and matrons who may be selected by the master for that purpose, unless with her consent; and that in the selection of surgeons and matrons for that purpose, the said master have a due regard to the feelings and wishes of the said defendant.

And it is further ordered, that no person shall be permitted to be present before the master, on the said reference, except the parties to this suit and their counsel and witnesses, and such of the friends of either of the parties as they, or either of them, may request to attend upon such reference. And it is further ordered that the said master do return the proofs taken before him, in a schedule to his report.(a)

(a) See *Devanbagh v. Devanbagh*, 5 Paige, 558.

And it is further ordered, that the provisions of the 170th rule of this court relative to copies of proceedings and testimony in adultery suits be deemed to apply to this case, and that those provisions be binding upon, and be observed by, the several officers therein named, so far as relates to the proceedings and testimony in this cause.

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No. 450.

*Bill to dissolve marriage because of adultery.*

See ante, pp. 252, 256.

[Commence as in No. 1.]. Your orator J. A. D., of the town of Saratoga Springs, in the county of Saratoga, and state of New York. That on or about the — day of —, in the year of our Lord one thousand eight hundred and twenty-five, your orator intermarried with C. B., (now C. D.,) at the town of Hague, in the county of Warren, and state aforesaid; and that your orator continued to live with the said C. as his wife until about the — day of —; and that from the time of the said marriage they have been, and at the time and times of the commission of the several acts of adultery hereinafter set forth, were, and now are, inhabitants of this state.

And your orator further showeth unto your honor, that during the time he lived and cohabited with the said C. as his wife, she had five children, to wit: A., aged about seventeen; M., aged about fifteen; H., now deceased; D., aged about ten; and M. E., aged about four. But your orator charges that he is not the father of the said M. E., she being illegitimate.

\*And your orator further showeth unto your honor, [\*VOL. II, 681] that he is informed and believes, and charges the truth to be, that the said C., disregarding the solemnity of the marriage vow, hath since the marriage of your orator with her, as aforesaid, committed adultery at divers times and places, and especially that the said C., on some day or days during the year 1835, but on what particular day or days your orator is ignorant, at the town of —, in the county of —, and state aforesaid, did commit adultery and have carnal connection with one D. M. and one J. L.; and that the said C., at various other times during the said year 1835, committed adultery, and had carnal

connection with the said D. M. and the said J. L., at the town and county last aforesaid, or at some place or places within the said county.

And your orator further showeth unto your honor, that he is informed and believes, and therefore charges the truth to be, that the said C. so disregarding the solemnity of the marriage vow as aforesaid, hath since your orator's said intermarriage with her, committed adultery at divers times and in various places, and especially that the said C. on the — day of —, in the year —, at the village of —, did commit adultery and have carnal connection with one M. W; and that the said C. did at various other times during the year 1837 commit adultery and have carnal connection with the said M. W. at the place last aforesaid, or at some other place or places within the said county of —.

And your orator further shows, that he was wholly and entirely ignorant of the commission of the aforesaid acts of adultery by the said C., or any or either of them, until about the — day of — last. That five years have not elapsed since he discovered the fact that such adultery had been committed by her; that he has not voluntarily cohabited with her since the discovery thereof; and that such adultery was committed by her without his consent, connivance, privity, or procurement.

And your orator further showeth that he is informed and believes and therefore charges the truth to be, that the said C. is now, and for some time past has been living with one L. N., in open and notorious adultery, at —, and that five years have not elapsed since the commencement of such adulterous intercourse was discovered by your orator. And your orator charges that such adulterous intercourse between the said C. and the said L. N. was begun and is continued without his consent, connivance, privity or procurement.

In consideration whereof, and to the end that the said C. may full, true and perfect answer make to all and singular the premises, and that as fully and particularly as if the same were here again repeated and she interrogated thereto; and that the marriage between your [\*VOL. II, 682] orator and \*the said C. may be dissolved, and a divorce decreed, according to the statute in such case made and provided, and that the said M. E. may be declared to be illegitimate. And that your orator may have such further relief, or such other relief in the premises as shall be equitable.

May it please [*prayer for process of subpoena.*]

[*Jurat.*]

J. A. D.



## No. 451.

*Order of reference on bill to dissolve marriage because of adultery.*

See ante, p. 257.

At, etc. [*as in No. 255.*]

[*Title.*]

On reading and filing due proof that the bill of complaint in this cause has been taken as confessed by [*or the facts charged in the bill of complaint in this cause having been admitted by the answer of*] the defendant, and on reading and filing the affidavit of regularity required by the 164th rule of this court, on motion of R. S. solicitor for complainant, ordered that it be referred to one of the masters of this court residing in the county of — to take proof of all the material facts charged in the said bill, and to report such proof to the court, with his opinion thereon.

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No. 452.

*Affidavit of regularity, required by Rule 164.*

See ante, p. 258.

[*Commence as in No. 257.*] R. S. solicitor for the above complainant, being duly sworn, says that the bill in this cause was filed in the office of the register of this court, on the — day of —, by the husband against the wife to dissolve the marriage between them because of the adultery of the defendant; that the said bill has been taken as confessed by the said defendant, after personal service of the subpoena upon her; and that all the proceedings to take such bill as confessed have been regular, according to the rules and practice of this court.

Sworn, etc

R. S.

## No. 453.

*Master's report on a bill to dissolve marriage because of adultery.*

See ante, p. 258.

[*Title of cause.*]

To the Chancellor of the State of New York.

In pursuance of an order of this court made in the above cause, and [\*VOL. II, 683] \*dated the — day of —, by which it was referred to one of the masters of this court residing in the county of — to take proof of all the material facts charged in the bill of complaint in this cause and to report such proof to this court with his opinion thereon; I the subscriber, one of the masters of this court residing in the county of —, to whom the execution of said order was confided, do hereby certify and report:

That I have taken proofs in this cause on the part of the complainant, and that such proofs are hereto subjoined and make a part of this my report.

And I do further certify and report as required by the said order, that in my opinion all the material facts charged in the complainant's bill in this cause are true, and have been sufficiently proved before me; and that the said defendant has committed the several acts of adultery charged in the said bill of complaint.

And I do further certify and report, that I am of opinion that all the children of the defendant named in the bill are legitimate except M. E., and that she the said M. E. is not the child of the complainant, but is illegitimate.

All which is respectfully submitted.

Dated, etc.

J. A., Master in chancery.

*Depositions annexed to report.*[*Title of cause.*]

Depositions taken this — day of December, in the year of our Lord one thousand eight hundred and forty-three in the above cause, on the part and behalf of the complainant, before J. A., a master in chancery.

Mr. R. C. appears as counsel for the complainant; no one appearing for the defendant.

M. F., a witness produced, was duly sworn by said master, and on being orally examined by the counsel for the complainant, deposeth

as follows: I am — years of age, and upwards. I reside in the town of — in the county of —. I am acquainted with both the parties in this suit, etc. etc.

Subscribed and sworn this — day } M. F.  
of December, 1843, before me, }

J. A., Master in chancery.

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[\*Vol. II, 684]

\*No. 454.

*Decree dissolving marriage because of adultery, on bill taken as confessed.*

See ante, p. 259.

At, etc.

[*Title of cause.*]

This cause having this day been brought on to be heard upon the bill of complaint filed therein, taken as confessed by the defendant, and upon the report of J. A., one of the masters of this court, from which it appears that all the material facts charged in the said bill are true, and that the defendant has been guilty of the several acts of adultery therein charged, and that M. E., the daughter of the said defendant, is not the child of the complainant, but is illegitimate; on motion of O. L. B., of counsel for said complainant, it is adjudged and decreed, and this court, by virtue of the power and authority therein vested, and in pursuance of the statute in such case made and provided, doth adjudge and decree that the marriage between the said complainant J. A. D. and the said defendant C. D. be dissolved, and the same is hereby dissolved accordingly. And the said parties are, and each of them is, freed from the obligations thereof. And it is further adjudged and decreed that it shall be lawful for the said complainant J. A. D., to marry again in the same manner as though the said defendant C. D. was actually dead; but it shall not be lawful for the said defendant C. D. to marry again, until the said complainant J. A. D. is actually dead. And it is further adjudged and decreed that the said M. E., the daughter of the said defendant C. D., is not the child of the said complainant J. A. D., but she is hereby declared to be illegitimate.

## No. 455.

*Notice of hearing on further directions, after trial of a feigned issue, in an adultery case.*

See ante, p. 259.

[*As in No. 213 to the words January next—then add*] And that a motion will then and there be made for a final decree in this cause.<sup>(a)</sup>

[\*VOL. II, 685]

\*No. 456.

*Decree dissolving marriage because of adultery, after the trial of a feigned issue.*

See ante, p. 259.

At, etc.

[*Title of cause.*]

This cause having this day been brought on to be heard for further directions, and for a final decree therein, on reading and filing the pleadings upon the feigned issue framed therein, in pursuance of an order of this court heretofore entered, and a certified copy of the minutes of trial of the said feigned issue; from which it appears that the jury empanelled to try the said feigned issue, have by their verdict, on the said trial, found that the said defendant C. D. has committed the several acts of adultery charged in the bill of complaint in this cause; and on motion of W. N. of counsel for said complainant, and on hearing Mr. H., of counsel for the defendant, it is adjudged and decreed [*conclude as in No. 454 from the (\*)*.]

## No. 457.

*Bill for a limited divorce, or separation.*

See ante, p. 260.

[*Commence as in No. 1.*] Your oratrix C. M., the wife of R. M., of, etc., farmer, by her next friend W. H., of, etc. That on or about the

(a) The forms of the proceedings upon a feigned issue for the trial of the question of adultery have not been given, because it is presumed the forms at page 488, *et seq. ante*, will be a sufficient guide. They can easily be varied to meet any other case.

— day of —, in the year of our Lord one thousand eight hundred and forty, your oratrix was duly married to the said R. M., at, etc.; and that your oratrix continued to live with the said R. M., as his wife, until about the — day of —. That at the time of the said marriage your oratrix and the said R. M. were, and now are, inhabitants of this state.

And your oratrix further showeth that during the time she lived and cohabited with the said R. M. as aforesaid, she had two children by him, to wit: [*insert names and ages.*] And that during all that time she conducted herself with propriety, managed the household affairs of her said husband with prudence and economy, and at all times treated her said husband with kindness and forbearance. But that the said R. M., disregarding the solemnity of his marriage vow, and his obligation to treat your oratrix with kindness and attention, within [\*VOL. II, 686] about a year after their \*said marriage commenced a course of unkind, harsh, and tyrannical conduct towards her, which continued with very slight intermissions, until she finally separated from him about three months since.

And your oratrix further showeth that on divers occasions, while your oratrix lived with the said R. M. as aforesaid, he was guilty of cruel and inhuman treatment of her, and of such conduct towards her as rendered it unsafe and improper for her to cohabit with him. That on or about the — day of —, in the year —, as your oratrix was sitting by the fire, the said R. M. came home, and pulled her chair from under her, threw her violently upon the hearth, and dragged her across the floor, under circumstances which showed an utter disregard of your oratrix's health, if not of her life. That on another occasion [*specify the several acts of cruelty and inhuman treatment.*]

And your oratrix further showeth that the said R. M. is a man of violent passions, and of ungovernable temper. And that on many occasions during the time your oratrix lived with him, the said R. M. addressed to her the most opprobrious epithets and threats of personal violence; and that he repeatedly threatened to take her life. And that in consequence of the cruel and inhuman treatment above mentioned, together with the threats aforesaid, and such brutal and outrageous conduct towards her as rendered it unsafe for her to live with him, or to remain within the reach of his violence, she was, on or about the — day of —, obliged to leave the house of the said R. M. and go to her friends; since which time she has not dared to return to his said house, or to live with him.

And your oratrix further showeth, that since she so left the house of the said R. M. he has refused to provide for her support and maintenance; and that she has been and is now entirely dependent upon her own labor and the charity of her friends for her support. That she is now very destitute and in great want; and that she is indebted, to a considerable amount, for board and necessary clothing.

And your oratrix further showeth, that within about a year after their said marriage the said R. M. received about \$—— as the distributive share of your oratrix in her father's estate; the whole of which he has applied and converted to his own use. And that the said R. M., as your oratrix is informed and believes, is seized and possessed of real and personal estate to the amount of \$——; and that his annual income is about \$——.

In tender consideration whereof, and forasmuch as your oratrix is remediless in the premises, at and by the strict rules of the common [\*VOL. II, 687] \*law, and can only be relieved in a court of equity where matters of this nature are properly cognizable and relievable—

To the end, therefore, that the said R. M. may, without oath (his answer to this bill on oath being hereby waived), full, true, direct, and perfect answer make to all and singular the premises, as fully as if the same were here again repeated, and he thereto particularly interrogated: and that a separation from bed and board forever may be decreed between your oratrix and the said R. M., and that he may be compelled, by a decree of this honorable court, to make a proper and suitable provision for the support and maintenance of your oratrix and her said children; and that your oratrix may have the care, custody and education of the children of the said marriage; according to the statute in such case made and provided. And that your oratrix may have [*general relief.*]

May it please [*prayer for process of subpoena.*]

R. S., sol. for com't.

C. M.

H. W. T., of Counsel.

[*Jurat.*]

I hereby consent that W. H. act as my next friend in the above suit.

Dated, etc.

C. M.

I hereby consent to be the next friend of C. M., the complainant, in the above suit, and to appear and act for her as such, according to the rules and practice of the court of chancery.

Dated, etc.

W. H.

Fulton county, ss. W. H., of —, in said county, being duly sworn says that he resides in — aforesaid, that he signed the above consent to become the next friend of C. M., and that he is worth over two hundred and fifty dollars, over and above all debts and demands against him.

Sworn to before me this }  
 — day of —, 1843. }

W. H.

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No. 458.

*Order of reference on a bill for a limited divorce.*

See ante, p. 263.

At, etc.

[As in No. 447 to the (\*), then proceed thus] affidavit of regularity required by the 164th rule of this court, [or the bill and answer, and [\*VOL. II, 688] \*proof of service of notice of this motion;] such bill having been filed for the purpose of obtaining a limited divorce or separation between the parties, on motion of R. S., solicitor for complainant, ordered that it be referred to one of the masters of this court residing in the county of —, to take proof of the material facts charged in the said bill, and to report such proof to the court with his opinion thereon. And it is further ordered, that upon such reference the said master may take the examination of the complainant, on oath, as to any cruel or inhuman treatment alleged in the bill, which took place when no witnesses were present who are competent to testify to the facts, on such reference.

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No. 459.

*Decree for a limited divorce or separation.*

See ante, p, 264.

At, etc. [as in No. 255.]

[Title of cause.]

This cause having this day been brought on to be heard, upon the bill taken as confessed by the defendant, and upon the master's report

made in pursuance of the 164th and 166th rules of this court, together with the proofs thereto annexed [*or upon the pleadings filed and the proofs taken therein*] and the said master's report [*or pleadings*] and proofs having been read, and Mr. H. W. T., of counsel for the complainant, [*and Mr. C. E., of counsel for the defendant*] having been heard, and the court having duly considered the said masters' report, [*or pleadings*] proofs, and arguments; and it appearing to this court that the defendant has been guilty of cruel and inhuman treatment of the complainant, and of such conduct toward her as to render it unsafe and improper for her to cohabit with him, it is ordered, adjudged and decreed, and this court by virtue of its power and authority, and of the statute in such case made and provided, doth order, adjudge, and decree, that the said complainant and defendant be separated from bed and board forever; provided, however, that the said parties may, at any time hereafter, by their joint petition, apply to this court to have this decree modified or discharged; and that neither of the said parties shall be at liberty to marry any other person during the life of the other party.

And it is further ordered and decreed, that the defendant pay to the complainant the sum of \$—— per annum from the date of this decree, in semi-annual payments, for the support and maintenance of [*\*VOL. II, 689*] the \*complainant and the children of the marriage named in the bill of complaint, and that he give security to the register of this court, to be approved of by a master, for the payment thereof.

And it is further ordered and decreed, that the said complainant have the care, custody and education of the said children of the marriage, until the further order of the court.

And it is further ordered, adjudged and decreed, that the defendant pay to the said complainant, or her solicitor, the costs of this suit, to be taxed; and that she have execution therefor.



## No. 460.

*Petition for alimony and expenses.*

See ante, p. 268

[*Title of cause.*]

To the Chancellor of the State of New York.

The petition of the above defendant respectfully showeth: That the said complainant A. B., has lately filed his bill in this court against your petitioner to obtain a decree dissolving the marriage solemnized between him and your petitioner, because of the alleged physical incapacity [*or adultery*] of your petitioner. That your petitioner being served with a subpoena for that purpose has caused her appearance to be entered in the said cause. And that she has put in her answer to the bill of complaint, on oath, denying the said physical incapacity [*or adultery*] with which she is charged in the said bill; as by reference to the said answer will more fully appear.

And your petitioner further showeth, that she is wholly destitute of the means of supporting herself during the pendency of this suit, or of carrying on her defence and defraying the costs and expenses attending the same. That your petitioner has been informed and verily believes the said complainant has real estate and personal property to a large amount, and amply sufficient to enable him to advance thereout, to your petitioner, such sums as may be necessary for the above mentioned purposes. That your petitioner is informed and believes, that the said complainant is the owner of property to the amount of more than \$—, and that his annual income is about \$—.

Your petitioner therefore prays that the said complainant may, by an order of this court, be required to pay to your petitioner a reasonable sum for her support and maintenance during the pendency of this suit, and such sum or sums of money as may be necessary to enable [\*VOL. II, 690] your \*petitioner to carry on her defence in this suit, and to defray the necessary costs and expenses thereof.

And for such other or further relief in the premises as to your honor may seem meet.

And your petitioner, etc.

Dated, etc.

[*Jurat.*]

## No. 461.

*Order of reference as to alimony ana expenses.*

See ante, p. 268.

At, etc.

[*Title.*]

On reading and filing the petition of the defendant, duly verified, and dated the — day of —, and the affidavits accompanying the same, on motion of W. H., solicitor for said defendant, and on hearing E. H. R., solicitor for the complainant, in opposition thereto, ordered that it be referred to one of the masters of this court residing in the county of —, to inquire and report what would be a reasonable sum to be allowed to the said defendant for her support and maintenance [*and for the support and maintenance of such of the children of the marriage as reside with her*] during the pendency of this suit. And it is further ordered, that the said master inquire and report what would be a reasonable sum to be allowed to said defendant, to enable her to carry on her defence in this suit, and to defray the necessary costs and expenses thereof. And that the said master report as to the times and manner in which the said sums should be paid by the complainant.(a)

(a) This order should direct that upon the coming in and confirmation of the master's report, the complainant pay the amount reported by the master, at the times and in the manner specified in the report. (See *Gerard v. Gerard*, 2 Barb. Ch. Rep. 73.)

## CHAPTER VIII.

## CONTEMPTS.

No. 462.

*Affidavit of service of order to pay costs; and of demand of payment of bill as taxed.*

See ante, p. 271.

[*Title of cause.*]

STATE OF NEW YORK, }  
 County of, *Saratoga*, } ss.

M. S., of, etc. being duly \*sworn, says that on the [\*VOL. II, 691] — day of — instant, he served upon E. F., one of the defendants in this cause, personally, a copy of the order hereto annexed, (\*) together with a copy of the bill of costs taxed under the said order, and demanded payment of the said bill of costs on behalf of the complainant; but the said E. F. neglected and refused to pay the said bill of costs (t) or any part thereof. That the said demand was made on behalf of the complainant in this cause, under and by virtue of a power of attorney from him, which is hereto annexed; and that at the time of such demand this deponent stated to said defendant the nature of his authority, and showed the said power of attorney to him.

Sworn, etc.

M. S.

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 No. 463.

*Power of attorney to demand payment of costs when they are directed to be taxed.*

See ante, p. 272.

I hereby authorize and empower M. S., for me, and in my name, to demand and receive payment of (\*) the amount of the above [or an-

*next*] bill of costs from the defendant E. F., which bill of costs has been taxed in pursuance of an order of the court of chancery, dated the — day of — last.

Sealed and delivered  
in the presence of  
M. R.

A. B. [L. S.]

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No. 464.

*The like, where the order specifies the amount.*

[*As in last form to the* (\*), *then as follows,*] and from the defendant E. F., of the sum of \$—, directed to be paid by the said E. F., in and by the order of the court of chancery, made on the — day of — instant, of which the annexed is a copy.

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No. 465.

*Affidavit of solicitor that costs, as taxed, have not been paid.*

[*Commence as in No. 462,*] R. S., solicitor for the complainant in this cause, being duly sworn says, that the sum of \$—, being the [\*VOL. II, 692] amount (\*) \*of the taxed bill of costs directed by the order of this court made on the — day of —, to be paid by the defendant E. F., has not, nor has any part thereof, been paid to this deponent, nor to the complainant, to the knowledge or belief of this deponent; although the said bill of costs has been duly taxed, and was filed in the office of the register of this court, together with the affidavit required on taxation, more than twenty days since.

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No. 466.

*Affidavit of service of order to pay costs, and of demand of payment, where order specifies the amount.*

See ante, p. 271.

[*As in No. 462 to the* (\*), *and then as follows,*] and demanded payment of the sum of \$— therein specified, on behalf of the complain-

ant; but that the said E. F. neglected and refused to pay the said sum of \$——. [*Conclude as in No. 462, from the (†).*]

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No. 467.

*Affidavit of solicitor that costs have not been paid, where order specifies the amount.*

See ante, p. 271.

[*As in No. 465 to the (\*), then as follows,*] directed by the order of this court, made on the —— day of ——, to be paid by the defendant E. F., has not, nor has any part thereof, been paid to this deponent, nor to the complainant, to the knowledge or belief of this deponent; although twenty days have elapsed since the service of a certified copy of said order.

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No. 468.

*Order for precept to commit for non-payment of costs ordered to be taxed.*

See ante, p. 271.

At, etc. [*as in No. 255.*]

[*Title of cause.*]

On reading and filing due proof of service of a copy of the order [\*VOL. II, 693] made in this cause, on the —— day of —— last, \*together with a copy of the bill of costs mentioned in said order, and taxed in pursuance thereof, on the defendant E. F. personally: and on reading and filing due proof of the demand of payment of the amount of said bill of costs, of the said defendant personally, and of his neglect to pay the same, or any part thereof, and the costs of the proceedings to compel payment of the costs aforesaid, having been taxed [*or fixed by the court,*] at the sum of \$——. On motion of R. S., solicitor for complainant, ordered that a precept be issued out of, and under the seal of this court, directed to the sheriff of the county of ——, commanding him to take the body of the said E. F., if he shall be found in his bailiwick, and commit him to the common jail of said county of ——, and to keep and detain him therein, under his custody,

until he shall pay the said sum of \$——, for the said costs so ordered to be paid; and also the said sum of \$——, for the costs and expenses of the proceedings to compel such payment, together with the fees of such sheriff on such precept.<sup>(a)</sup>

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No. 469.

*Precept to commit party to prison for non-payment of costs.* See Appendix to Rules, No. 10.

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No. 470.

*Notice of motion for an attachment for a contempt, other than for non-payment of money.*

See ante, p. 275.

[As in No. 249 to the asterisk, (\*) then as follows:] that an attachment as for a contempt be issued against the above defendant, for violating the injunction issued in this cause; and for such further or for such other order or relief as the court may think proper to grant; which motion will be founded upon the affidavits, with copies of which you are herewith served.

Dated, etc.

Yours, etc.

W. C. N., Complainant's solicitor.

To R. H., Solicitor for defendant.

<sup>(a)</sup> The precept should be directed to the sheriff of the county where the defendant resides; and that will authorize his arrest wherever he may be found. If it is returned *non est*, another writ may be issued to a different county. (Per Chancellor Walworth, Jan. 12, 1846.)

[\*VOL. II, 694]

\*No. 471.

*Order for an attachment for a contempt other than for non-payment of money.*

See ante, p. 275.

At, etc. [*as in No. 255.*]

[*Title of cause.*]

On reading and filing affidavits, etc., and on motion of W. C. N., solicitor for complainant, and on hearing R. H., solicitor for the defendant, in opposition thereto, ordered that an attachment as for a contempt, be issued against the said defendant, returnable at the next motion term of this court, to be held at —, on the — day of — next. And it is further ordered, that the said defendant be held to bail in the sum of \$—.

[For attachment under above order, see No. 7. For return to attachment, see ante, p. 366.]

No. 472.

*Order to show cause why attachment should not issue.*

See ante, p. 277.

At, etc. [*as in No. 255.*]

[*Title of cause.*]

On reading and filing affidavits, etc., and on motion of W. C. N., solicitor for complainant, ordered that the defendant C. D. show cause on the next motion day of this court, at, etc., on the — day of — next, why an attachment should not issue against him, and he be punished for his alleged misconduct in violating the injunction issued in this cause. And it is further ordered, that copies of the affidavits and other papers, on which this motion is founded, be served upon the said defendant personally, at least — days previous to the said — day of —.

## No. 473.

*Habeas corpus to bring up party to answer for a contempt, other than for non-payment of money. Ante, p. 278.*

See No. 25, ante, p. 378.

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[\*VOL. II, 695]

## \*No. 474.

*Bond on attachment, issued under No. 471.*

See ante, p. 276.

[As in No. 8 to the asterisk (\*), then proceed.]

Whereas the above named C. D., has been arrested upon an attachment issued out of, and under the seal of the court of chancery of the state of New York, as for a contempt, for violating the injunction issued in a certain cause pending in said court, wherein A. B. is complainant, and the said C. D. is defendant, and is now in the custody of the said J. F., sheriff as aforesaid.

Now the condition, [*conclude as in No. 8.*]

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## No. 475.

*Order for alias attachment, where defendant fails to appear on return of attachment.*

See No. 9, ante, p. 368.

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## No. 476.

*Order for leave to prosecute bond, for non-appearance on return of attachment.*

See No. 10, ante, p. 368.



## No. 477.

*Order on return of attachment, where defendant appears and denies his contempt.*

See ante, p. 276.

[As in No. 12 to the asterisk (\*), then conclude as in No. 15.]

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## No. 478.

*Interrogatories on return of attachment, and answers thereto.*

See ante, p. 276.

These can easily be drawn from the forms, ante, pp. 372, 373. Nos. 16, 17.

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[\*VOL. II, 696]

\*No. 479.

*Order convicting defendant of a contempt, after his examination upon interrogatories.*

See ante, p. 279.

At, etc. [as in No. 255.]

[Title of cause.]

A writ of attachment having been heretofore issued out of, and under the seal of this court, against the defendant C. D., for his contempt in violating the injunction heretofore issued in this cause, which attachment was directed, [proceed as in No. 19, to the words—"there to remain charged upon this contempt"—then add,] until he shall have paid the said sum of \$100, together with the said costs and charges; unless the court shall see fit sooner to discharge him. And that a warrant issue for that purpose.

## No. 480.

*Process of commitment for a contempt.*

See ante, p. 280.

The People of the State of New York to the Sheriff of [L. s.] the county of Saratoga greeting: Whereas, on the — day of — by a certain order made in our court of chancery before our chancellor [*or before our vice-chancellor of the fourth circuit*] at —, in a certain cause depending in our said court between A. B. complainant, and C. D. defendant, it was ordered that the said defendant be committed to the common jail of the said county of Saratoga, there to remain charged with the contempt mentioned in the said order until he should have paid the fine of \$100 imposed upon him for his misconduct, together with the costs and expenses of the proceedings for such misconduct, which were taxed at the sum of \$—; and that a warrant issue for that purpose. Now we command you [*conclude as in No. 20.*]

For sheriff's certificate, or return to above—see ante, p. 375.

[\*VOL. II, 697]

\*No. 481.

*Order for sequestration upon a contempt other than for non-payment of money.*

See ante, p. 280.

At, etc. [*as in No. 255.*][*Title of cause.*]

The defendant C. D. having been committed to the common jail of the county of Saratoga, in pursuance of an order of this court made on the — day of — last, by which it was ordered that the said defendant should stand committed to the common jail of said county, there to remain charged upon the contempt mentioned in said order, until he should have paid the fine of \$100 imposed upon him for his misconduct, together with the costs and expenses of the proceedings for such misconduct, which were taxed at \$—, and it now appearing to the court by the certificate of the sheriff of said county of Saratoga, indorsed upon the warrant of commitment issued in pursuance of said order, that the said defendant has been taken and kept,

and is still kept by the said sheriff in his custody in said common jail by virtue of said warrant ; and it appearing from the affidavit of the complainant's solicitor in this cause that the said defendant hath not yet obeyed the said order, but perseveres in his refusal to pay the money in the said order directed to be paid ; on reading and filing the said warrant of commitment, sheriff's certificate, and affidavit, and on motion of W. C. N., solicitor for complainant, ordered that a writ of sequestration issue out of and under the seal of this court directed to —, giving them, or any three of them, full power and authority to enter upon all the messuages, lands, tenements and real estate whatsoever of the said C. D., and to take, collect, receive, and sequester into their hands not only all the rents and profits of the said messuages, lands, tenements, and real estate, but also all his goods, chattels, and personal estate whatsoever, and commanding them, or any three of them, at certain proper and convenient days and hours to go to, and enter upon, all the messuages, lands, tenements, and real estate of the said C. D. ; and that they collect, take, and get into their hands, not only the rents and profits of all his said real estates, but also all his goods, chattels, personal estate, and choses in action, and to detain and keep the same under sequestration in their hands, or to pay the same in such manner, and to such persons, as this court shall appoint, until the said C. D. shall clear his said contempts, and this court shall make an order to the contrary.

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[\*VOL. II, 698]

\*No. 482.

*Sequestration for a contempt.*

The People of the State of New York to [names of commissioners] greeting : Whereas, by an order of our court of chancery made on the — day of — in a certain cause depending in said court, wherein A. B. was complainant, and C. D. defendant, the said C. D. was convicted of a contempt of our said court in violating the writ of injunction issued in said cause, and was fined \$100 therefor, and was directed to pay to the said complainant the costs and expenses of the proceedings for such misconduct, taxed at the sum of \$—, and to stand committed to the common jail of the county of Saratoga, there to remain charged upon the said contempt until he

should pay such fine and costs. And whereas the said C. D. having been committed to the common jail of said county in pursuance of the said order, under and by virtue of a warrant issued for that purpose, is still kept by the sheriff of said county in his custody there by virtue of said warrant, and hath not yet obeyed the said order, but perseveres in his refusal to pay the money in the said order directed to be paid, as to our said court of chancery, before the chancellor thereof, has been fully made to appear.

Know ye, therefore, that we [*as in No. 31 to the words "personal estate" in 6th line from bottom—then add*] and chuses in action, and to keep and detain the same under sequestration in your hands, or pay the same in such manner and to such persons as our said court shall appoint, until the said C. D. shall clear his said contempts and our said court shall make an order to the contrary.

Witness, etc. [*as in No. 7.*]

## CHAPTER IX.

## PARTITION SUITS.

No. 483.

*Bill for partition.*

See ante, p. 290.

[*Commence as in No. 1,*] your orator, R. H. of, etc. That L. H. of, etc. deceased, late father of your orator, was, in his lifetime, seised in [\*Vol. II, 699] \*fee simple of the following described real estate, to wit, [*insert description.*]

And your orator further shows unto your honor, that the said L. H. being so seised as aforesaid of the property above described, died on the — day of —, intestate, leaving C. H., his widow, and your orator, A. H. and E., wife of B. C., deceased, his children; and S. H. and E. H., his grand children, being children of H. H., a deceased son of the said L. H., his heirs at law.

And your orator further shows unto your honor that at the time of the death of the said L. H., all the above named heirs were of full age, except S. H. and E. H., the said grand children, whose mother S. A. H., as your orator is informed and believes, still lives; and that, as your orator is also informed and believes, the said infant children are both under the age of fourteen years, and together with their mother are non-residents of this state, and that they reside at, — etc.

And your orator further shows unto your honor that J. M. C., of —, has mortgages upon the first of the above described parcels of land and upon the village lot in —.

And your orator further shows unto your honor that by the death of the said L. H., intestate as aforesaid, your orator, A. H. and E., wife of B. C., deceased, S. H. and E. H. became seised in fee as tenants in common, by descent from the said L. H., of the said described property: that is to say, your orator and A. H. and E. C. each became seised of the one equal undivided fourth part of the said described

property, and the said S. H. and E. H. became seised each of one undivided eighth part thereof; that is to say, of the one equal undivided fourth part thereof which would have belonged to the said H. H., had he survived the said L. H.; each of the said portions being subject, however, to the right of dower of the said C. H., widow of the said L. H., and to the said mortgages held by the said J. M. C.

And your orator further shows that the dower of the said widow, in the premises above described, has never been admeasured or in any way set apart to her from the estate of the said L. H.

And your orator further shows unto your honor that he is desirous that a partition or division should be made of the said several parcels of land among the several parties seised of, or entitled thereto according to their respective rights, estates and interests therein; or in case the said several parcels of land cannot be divided among the owners thereof without material injury to the parties interested therein, then that the same may be sold, and the proceeds thereof divided among such parties, according to their respective rights and interests; but [\*VOL. II, 700] inasmuch as the \*said S. H. and E. H., two of the heirs of the said L. H., on account of their respective minorities, are severally incompetent to make a voluntary partition of the said premises, which will be valid, or to consent to the sale thereof; so far as they are severally interested therein, and as your orator is advised that no valid partition, division or sale thereof can be effected without the aid and interposition of some court of competent jurisdiction. Wherefore your orator has been advised to apply to this court for aid and direction in the premises.

In consideration whereof, and to the end that the said C. H., A. H., E. C., S. H., E. H., S. A. H., the mother and guardian in socage of the said infants, and the said J. M. C. may, upon their several and respective corporal oaths, full, true and perfect answer make to all and singular the premises, to the best of their and each of their knowledge, information and belief, together with all and singular the circumstances relating thereto, and that as fully and particularly as if the same were here again repeated, and they thereto particularly interrogated. And that a guardian ad litem may be appointed for the said S. H. and E. H., respectively, in consideration of their respective minorities, by whom they may respectively appear in this suit and put in their answers to this bill of complaint, and who may defend and protect their several rights and interests in the said premises; and that partition and division of the above described premises may be

made according to the course and practice of this court and the statute in such case made and provided, by commissioners to be appointed for that purpose. And in case it shall appear that a partition thereof cannot be made without material injury to the rights of the parties interested therein, then that the said premises may be decreed to be sold under the direction of this court, and the proceeds of the sale, after paying the costs and charges of this suit, be divided among the said parties according to their respective rights and interests therein. And that, to that end, the rights and interests of the parties interested in the said premises or in the proceeds thereof, may be ascertained and declared by the order or decree of this court; and that your orator may have such other relief, or such further relief, in the premises as the nature of this case may require, and as shall be agreeable to equity.

May it please [*prayer for subpoena.*]

[*Jurat.*]

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No. 484.

*Another form of bill for partition.*

[*Commence as in No. 1.*] Your orator and oratrix, T. F., of, etc., [\*Vol. II, 701] \*and E. his wife. That P. D., the father of your oratrix, the said E., and late of, etc., now deceased, was, at the time of making his last will and testament, and also at the time of his death, seised in fee simple and possessed of all that certain farm, piece, or parcel of land situate, lying and being in —, bounded and described as follows: [*insert description.*] And being so seised and possessed as aforesaid, the said P. D. died on or about the — day of —, in the year —.

And your orator and oratrix further show unto your honor that the said P. D., deceased, in his lifetime, to wit, on or about the — day of —, in the year —, made and published his last will and testament in due form of law and duly authenticated to pass real estate, a copy of which is hereto annexed marked “schedule A.”

And your orator and oratrix further show that the said testator, in and by his said last will and testament did, among other things give, devise, and bequeath unto his son S. D. and to his heirs forever, all

that certain farm, piece, or parcel of land herein before described and set forth, subject to a life estate therein of his mother M. D., the widow of the said P. D.

Your orator and oratrix further show that the said S. D., on or about the — day of —, in the year —, died intestate and without lawful issue; leaving your oratrix, the said E., wife of your orator S. M., widow of C. M., deceased, J. D., C. D. and M. W., his only heirs-at-law him surviving.

And your orator and oratrix further show that the said M. D., widow of the said P. D. the testator, departed this life on or about the — day of —, in the year —. And that by means of the deaths of the said S. D. and M. D. as aforesaid, the farm, piece or parcel of land above described, became and was vested in your oratrix, S. M., widow of C. M., deceased, J. D., C. D. and M. W. his only heirs-at-law, as tenants in common in fee.

And your orator and oratrix further show unto your honor that on or about the — day of —, in the year —, and subsequent to the death of the said S. D., the aforesaid J. D. and S. his wife, by their certain deed or instrument in writing, executed and acknowledged in due form of law to pass real estate, did remise, release, and quit-claim unto your orator all their right, title and interest, of, in and to the aforesaid farm, piece, or parcel of land; as by reference to the said deed or instrument, when produced, will more fully appear.

And your orator and oratrix further show unto your honor that the several parties to this suit are seised in fee simple, and entitled to the farm, piece or parcel of land, as tenants in common, and that their [\*VOL. II, 702] rights \*and interests therein are as follows: your orator the said T. F., as grantee of the said J. D., is seised of and entitled to an undivided — part thereof; that your orator and oratrix, in right of the said E. are also seised of, and entitled to an undivided — part thereof, etc., [*set forth in this manner the interests of all the parties.*]

Your orator and oratrix further show that the aforesaid farm, piece, or parcel of land is the only real estate owned in common by the parties to this suit; and that there are no specific liens, or incumbrances upon the said farm, piece or parcel of land, against any of the parties to this suit, to the knowledge or belief of your orator and oratrix.

Your orator and oratrix further show that the aforesaid farm, piece or parcel of land, for the partition of which this suit is brought, is so circumstanced that a partition thereof by metes and bounds among



the respective owners thereof cannot be made without great prejudice to their interests, as your orator and oratrix believe.

Your orator and oratrix further show unto your honor, that they are desirous that a sale should be made of the aforesaid farm, piece or parcel of land, and that the moneys arising therefrom may be divided among the owners of said farm according to their several interests therein, and for that purpose have made frequent applications to the other owners thereof. And your orator and oratrix well hoped that they would have complied with such reasonable request, as in justice and equity they ought to have done.

But now so it is, may it please your honor, that the said [*naming defendants*] defendants in this suit, combining and confederating with divers persons unknown to your orator and oratrix, but whose names, when discovered, your orator and oratrix pray may be inserted herein, and they made parties hereto, with proper and apt words to charge them, and contriving how to injure and oppress your orator and oratrix in the premises, they the said defendants refuse, under various pretences, all of which are untrue, to comply with the reasonable request of your orator and oratrix to join in a partition of the said farm, piece or parcel of land above described.

All which actings, doings, etc. [*as in No. 1.*]

In tender consideration whereof [*as in No. 1.*]

To the end therefore [*general interrogatory as in No. 1.*] And that the parts or shares justly belonging to your orator and oratrix and all the other owners hereinbefore named, of, in, and to the aforesaid farm, piece or parcel of land, may be settled and ascertained by and under the direction of this court. And that a fair partition and division thereof may be made between your orator and oratrix and all [\*Vol. II, 703] other persons who \*shall appear to be owners of or interested therein, according to the respective rights and interests of each therein. And that a commission of partition may be issued out of and under the seal of this court, and proper commissioners may be appointed for the purpose of making partition of the said premises. Or in case a partition thereof, or of any part thereof, by metes and bounds, or a division, cannot be made without great prejudice to the owners, then that the same, or such part thereof as cannot be divided by metes and bounds, may be sold by and under the direction of this court, and that the proceeds of the sale, after paying the costs and charges of this suit, may be divided among the owners thereof according to their several rights and interests therein. And that, to

that end, the rights and interests of the parties interested in the said premises, or in the proceeds of the sale thereof, may be ascertained and declared by the order or decree of this court. And that your orator and oratrix may have such other [*prayer for general relief.*]

May it please your honor [*prayer for process of subpoena.*]

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No. 485.

*Petition for partition.*

See ante, p. 290.

[*Title.*]

To the Chancellor of the state of New York.

The petition of S. G. of, etc. respectfully showeth—that he your petitioner and one J. G. of — aforesaid are seised in fee as tenants in common, in equal proportions, of the following pieces or parcels of land, with the appurtenances, situate, lying and being in — aforesaid, bounded and described as follows: [*insert description.*]

And your petitioner further showeth, that the said J. G. obtained his title to one equal undivided share of the above described premises by devise from his father, W. G., late of, etc. now deceased, and that your petitioner obtained his title to the equal undivided share thereof which is claimed by him, by purchase from L. G., the brother of the said J. G., to whom the same was devised by his father the said W. G. And that the several pieces or parcels of land above described comprise the only real estate owned in common by your petitioner and the said J. G.

And your petitioner further showeth that he your petitioner, as well as the said J. G., is of full and lawful age; and that there are no specific liens or incumbrances upon the several pieces of land above described, or any or either of them, against either of the owners thereof, to the knowledge or belief of your petitioner.

And your petitioner further showeth that he is desirous of having a [*\*VOL. II, 704*] \*partition or sale of the above mentioned premises made under the direction and with the sanction of this court.

Your petitioner therefore prays that a partition and division of the several pieces or parcels of land above described may be made by and under the direction of this court, between your petitioner and the said J. G. according to their respective rights and interests therein. And

that a commission may be issued out of and under the seal of this court, to make partition thereof, to be directed to proper commissioners appointed by this court, for that purpose. Or in case a partition thereof, or of any part thereof, by metes and bounds, cannot be made without great prejudice to the owners, then that the said premises, or such part thereof as cannot be divided by metes and bounds, may be sold by and under the direction of this court, and that the proceeds of the sale, after paying the costs and expenses of this suit, may be divided among the owners thereof according to their respective rights and interests therein. And that your petitioner may have such other and further relief, etc.

And your petitioner, etc.

S. G.

[*Jurat.*]

[Notice of presentation of petition, see No. 145, ante, p. 443.

Affidavit of service of petition and notice, see No. 146, ante p. 443.]

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No. 486.

*Notice of lis pendens in a partition suit.*

See ante, p. 293.

[*Title of cause.*]

Notice is hereby given to all whom it may concern, that the bill in the above cause was filed against the defendants therein named [*and all other parties interested in the premises described in said bill whose names and places of residence are unknown to the complainant*] for the purpose of obtaining a partition and division of the premises therein described, among the owners thereof, by commissioners to be appointed for that purpose; or for a sale thereof under the direction of the court of chancery and for a division of the proceeds of such sale among such owners, according to their several and respective rights and interests therein; which premises are described in the said bill of complaint as follows, to wit: [*insert description.*]

Dated, etc.

W. N., Solicitor for complainant.

[\*VOL. II, 705]

\*No. 487.

*Affidavit to obtain an order of publication in a partition suit where defendant is a non-resident.* See ante, p. 292.

See No. 54, ante, p. 396.

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No. 488.

*The like against unknown owners.*

See ante, p. 292.

[*Title of cause.*]

STATE OF NEW YORK, }  
     — county.        } ss.

W. N., solicitor for the above complainant, being duly sworn deposes and says that the bill in this cause is filed for a partition of certain real estate therein described. That J. R., who formerly owned one equal undivided fifth part of the said premises as tenant in common with the above complainant and the defendants named in this suit, died on or about the — day of —, in the year —, at —, as this deponent is informed and believes. But whether the said J. R. had sold his interest in the said premises, previous to his death, or left any will disposing of the same, or whether he left any heirs at law who would inherit the same, this deponent has been unable to ascertain although he has made diligent inquiry for that purpose.

Sworn, etc.

W. N.

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No. 489.

*Order for publication as to absent or unknown owners in partition suit.*

See ante, p. 292.

At, etc. [*as in No. 255.*]

[*Title of cause.*]

It satisfactorily appearing to this court that the defendant C. D. is a non-resident of this state and that there are other persons whose

names and places of residence are unknown, who have an interest in the lands of which partition is sought by the bill in this cause, on motion of Mr. N., solicitor for the complainant, ordered that the said C. D., and all other parties interested in the said premises, do [\*VOL. II, 706] \*appear and answer the bill of complaint filed in this cause by the — day of — next, or that such bill be taken as confessed by them; which premises are described as follows: [*insert description.*] And it is further ordered, that within twenty days the said complainant cause a notice of this order to be published in the state paper and in the —, a newspaper printed in the county of —, where the said premises are situated; and that the said publication be continued in each of the said papers at least once in each week for three weeks in succession; or that he cause a copy of this order to be personally served on the said C. D. and on each of the said unknown owners.

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No. 490.

*Notice of order to appear, with affidavit of publication.*

[*Title of cause.*]

Bill for partition of lands. M. D. and C. D., two of the defendants in this cause, whose places of residence are in the state of —, and all other persons interested in the premises of which partition is sought by the bill in this cause, being lots Nos. 50 and 51 in the village of —, whose names and places of residence are unknown, are required to appear and answer the bill of complaint in this cause by the — day of — next, or such bill will be taken as confessed against them.

STATE OF NEW YORK,    )  
 City and County of Albany. } ss.

P. K., of the city of Albany, being duly sworn, says that he is foreman in the office of the —; the paper published by the printer to the state; and that the notice of which the annexed is a printed copy has been regularly published in the said — once in each week for three weeks successively, commencing on the — day of — last past.

Sworn, etc.

P. K.

## No. 491.

*Affidavit of non-appearance in a partition suit.*

See No. 60, ante, p. 399.

[\*VOL. II, 707]

\*No. 492.

*Affidavit of filing notice of lis pendens in a partition suit.*

[Title of cause.]

Saratoga County, ss. W. N., the complainant's solicitor in the above cause, being duly sworn says, that the bill in this cause was filed to obtain a partition or sale of the premises described therein. That a notice of the pendency of this suit and of the general object thereof, and containing a description of the land sought to be partitioned, or sold, was filed in the office of the clerk of the county of Saratoga, that being the county in which the premises are situated, on the — day of — last. That at the time of filing the said notice the premises described therein were, and now are, situated in the town of —, in the said county of Saratoga; and that since the filing of the said notice the bill in this cause has not been amended by making new parties to the suit, or so as to affect other property not described in the original bill.

Sworn, etc.

W. N.

## No. 493.

*Order taking bill of partition as confessed after publication of notice of order to appear.*

See ante, p. 293.

Same as in No. 61, ante, p. 399—omitting the latter part, which directs a reference.

## No. 494.

*Petition by complainant for appointment of a guardian ad litem for a non-resident infant, after publication.*

See ante, p. 293.

[*Title of cause.*]

To the Chancellor of the State of New York.

The petition of the above complainant respectfully sheweth: That the bill in this cause was filed for the partition or sale of certain pieces or parcels of land therein described, in which it is alleged the defendants have some estate or interest.

And your petitioner further shows that E. F., one of the said defendants, [\*VOL. II, 708] is an infant under the age of twenty-one years, to wit, of the age of about ——— years, and resides in (\*) the state of ———. That on the ——— day of ——— last, an order was made in this cause as he is informed by his solicitor and believes, requiring the said E. F. to appear and answer the bill of complaint filed therein by the ——— day of ——— then next.

And your petitioner further shows that notice of said order has been duly published, as directed therein, as will appear from the affidavits hereto annexed; but that the said E. F. has not appeared, nor caused a guardian ad litem to be appointed to defend this suit; nor hath any application for that purpose been made by or on behalf of the said E. F., as your petitioner is informed by his solicitor and believes.

Your petitioner therefore prays that W. R., of ———, a solicitor of this court, may be appointed the guardian ad litem of the said E. F. for the special purpose of taking charge of the interests of the said E. F., in relation to the proceedings in this suit.

And your petitioner, etc.

A. B.

## No. 495.

*Order appointing guardian ad litem on preceding petition.*

See ante, p. 293.

At, etc.

[*Title of cause.*]

On reading and filing petition of the above complainant, and affidavits showing the due publication of notice of an order made in this

cause on the — day of — last, requiring the defendant E. F., an infant under the age of twenty-one years, to appear and answer the bill of complaint filed in this cause by the — day of — then next, and on reading and filing due proof that the said E. F. has not yet appeared nor caused a guardian ad litem to be appointed, on motion of W. N., solicitor for complainant, ordered that W. R., of —, a solicitor of this court be, and he is hereby appointed the guardian ad litem of the said E. F. for the special purpose of taking charge of his interests in relation to the proceedings in this suit, upon his executing a bond to the people of this state, in the penalty of \$—, with two sufficient sureties to be approved of by a master of this court, conditioned for the faithful discharge of his trust, and to render a just and true account of his guardianship, whenever lawfully required. And it is further ordered that such bond be approved, as to its form and manner of execution, by one of the masters of this court, and filed in the office of the register.

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[\*Vol. II, 709]

\*No. 496.

*Bond of guardian ad litem in partition suit.*

See ante, p. 293.

[As in No. 396 to the (f)—except that it is made payable to the people of the State of New York—then proceed thus:] W. R. was appointed the guardian ad litem of the above named E. F., for the special purpose of taking charge of his interest in relation to the proceedings in a suit commenced in that court against him by A. B., for the partition or sale of certain lands specified in the bill of complaint filed in said cause, upon his giving the bond therein required. Now, therefore, the condition of this obligation is such that if the above bounden W. R. shall faithfully discharge the duties of his trust as such guardian ad litem, and shall render a just and true account of his guardianship whenever lawfully required, then this obligation to be void; otherwise to be and remain in full force and virtue.

[*Acknowledgment, see No. 396.*]

I approve of the within bond as to its form and manner of execution, and as to the sufficiency of the sureties; I having taken from



each of said sureties an affidavit that he is worth the sum of \$—— over and above all debts and responsibilities.

J. R., Master in Chancery.

Dated, etc.

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No. 497.

*Petition to appoint the register or clerk guardian ad litem in a partition suit.*

See ante, p. 294.

[As in No. 494 to the asterisk (\*)—then proceed thus:] this state. That a subpoena to appear in this cause, was issued out of this court against all the defendants, on the —— day of —— last, returnable on the —— day of —— instant, and was duly served on the said infant before the return day thereof, as appears by the affidavit of service thereof hereto annexed. And that although more than twenty days have elapsed since the return day of the said subpoena, the said E. F. has not caused his appearance to be entered in this cause. And that no person hath been appointed, or applied or consented to be appointed, guardian ad litem of the said E. F.; nor hath any application been [\*VOL. II, 710] made to the \*court for that purpose, as your petitioner is informed by his solicitor and believes to be true.

Your petitioner therefore prays, that the register [or clerk] of this court may be appointed the guardian ad litem of the said E. F., for the purpose of taking charge of, and protecting his rights in this suit.

And your petitioner, etc.

Dated, etc.

A. B.

[*Jurat.*]

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No. 498.

*Affidavit of service of above petition.*

See ante, p. 294.

[*Title of cause.*]

Saratoga county, ss. J. S., of, etc., being duly sworn says, that on the —— day of —— instant, he served on [S. W., the general guardian

of,] E. F., the infant within named, a copy of the within petition and notice, by delivering the same to him personally; he having no general guardian, as this deponent is informed and believes.

And further this deponent saith not.

Sworn, etc.

J. S.

No. 499.

*Order appointing register or clerk guardian ad litem, upon No. 497.*

See ante, p. 294.

At, etc. [*as in No. 255.*]

[*Title of cause.*]

On reading and filing petition of the above complainant, duly verified, and dated the — day of — instant, praying for the appointment of the register [*or clerk*] of this court as guardian ad litem for E. F., the infant defendant; and on reading and filing due proof of service of a copy of said petition and notice of presenting the same on [*S. W., the general guardian of*] the said infant; on motion of Mr. N., of counsel for complainant, ordered that the register [*or clerk*] of this court be, and he is hereby appointed the guardian ad litem of the said E. F., for the purpose of taking charge of, and protecting his rights in this suit.

[\*VOL. II, 711]

\*No. 500.

*Answer of infants to bill for partition.*

See ante, p. 294.

IN CHANCERY.

Before, etc.

The joint and several answer of S. H. and E. H., infants under the age of twenty-one years, by G. M. D., clerk in chancery of the 4th circuit, their guardian ad litem, two of the defendants to the bill of complaint of H. H., complainant.

These defendants, answering by their said guardian, say that they are strangers to all and singular the matters and things in the said bill of complaint contained; that these defendants are infants under

the age of twenty-one years, and claim such interest in the premises in the said bill mentioned, as they are entitled to, and submit their interests to the protection of this honorable court.

C. M. D., Solicitor

G. M. D., Guardian ad

for guardian ad litem.

litem for infant defendants.

W. A. B., of counsel.

[*Jurat by guardian ad litem.*]

No. 501.

*Answer of adults to bill for partition.*

IN CHANCERY.

Before, etc.

The joint and several answers of C. D. and E. F., defendants, to the bill of complaint of A. B., complainant.

These defendants [*as in No. 84 to the (\*), then proceed thus:*] they admit that the rights and interests of the several parties, complainant and defendants named in the said bill of complaint in and to the several pieces or parcels of land mentioned and described in said bill are truly set forth and stated in said bill. And these defendants submit to such decree as this court may make in the premises, either for a partition of the said several pieces or parcels of land, or for a sale thereof, or of such parts thereof as shall be found incapable of partition without material injury to the parties interested therein.

[\*VOL. II, 712]

\*No. 502.

*Affidavit to obtain order of reference to take proof of title, etc. under 177th rule.*

See ante, p. 296.

[*Title of cause.*]

Saratoga county, ss. W. T. S., the solicitor for the above complainants, being duly sworn says, that the bill of complaint in this cause is filed for the partition or sale of certain premises situated in the town

of —, in said county; that said bill has been taken as confessed by all the adult defendants, [or, that all the adult defendants have put in their answers, in which the rights and interests of the several parties as stated in the bill are not contested or denied,] and that the infant defendants, by their guardian ad litem, have put in the usual answer submitting their interests to the care and protection of this court.

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No. 503.

*Order of reference to take proof of title under 177th rule*

At, etc.

[*Title of cause.*]

On reading and filing an affidavit, by which it appears that the bill in this cause was filed for the partition or sale of certain premises therein mentioned and described, and that such bill has been taken as confessed by all the adult defendants therein; [or that all the adult defendants have put in their answers, in which the rights and interests of the several parties as stated in the bill are not contested or denied,] and the infant defendants, by their guardian ad litem, having put in the usual general answer, on motion of W. T. S., solicitor for the complainant, ordered that it be referred to a master of this court residing in the county of Saratoga to take proof of the complainant's title and interest in and to the premises in the said bill mentioned, and of the several matters set forth in said bill; and to ascertain and report what share or part of the said premises belongs to each of the parties to this suit, so far as the same can be ascertained, and the nature and extent of their respective rights and interests therein, and an abstract of the conveyances by which the same are held.

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No. 504.

*Affidavit to obtain order of reference where a sale is necessary.*

[As in No. 502 to the end, then add:] And this deponent further saith, that he has been informed and believes that [one of the lots or sep-  
[\*Vol. II, 713] \*arate parcels of] the premises mentioned in the said

bill of complaint [*to wit, the house and lot in the city of Troy, which will exceed in value the share to which either of the tenants in common thereof will be entitled, is*] are so circumstanced that a partition thereof cannot be made without great prejudice to the owners, due regard being had to the power of the court to decree compensation to be made for equality of partition, and to the ability of the respective parties to pay a reasonable compensation to produce such equality.

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No. 505.

*Order of reference to take proof under 177th and 178th rules, where sale is necessary.*

[*As in No. 503 to the end, then add:*] And it is further ordered that the said master inquire and report whether the said premises, or any lot or separate parcel thereof, are so circumstanced that an actual partition cannot be made; and if the said master arrives at the conclusion that a sale of the whole premises, or of any lot or separate parcel thereof will be necessary, that he specify the same in his report, together with the reasons which render a sale necessary; and in such a case that he also ascertain and report whether any creditor not a party to this suit has a specific lien, by mortgage, devise, or otherwise, upon the undivided share or interest of any of the parties in that portion of the premises which it is necessary to sell; and if he finds that there is no such specific lien in favor of any person not a party to the suit, that he further inquire and report whether the undivided share or interest of any of the parties in the premises is subject to any general lien or incumbrance, by judgment or decree. And it is further ordered that such master ascertain and report the amount due to any party to the suit who has either a general or specific lien on the premises to be sold, or any part thereof, and the amount due to any creditor, not a party, who has a general lien on any undivided share or interest therein, by judgment or decree, and who shall appear and establish his claim, on such reference.

And it is further ordered, that the said master, if requested by the parties who appear before him on such reference, shall also ascertain and report the amount due to any creditor, not a party to the suit,

which is either a specific or general lien or incumbrance upon all the shares or interests of the parties in the premises to be sold, and which would remain as an incumbrance thereon in the hands of the purchaser.

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[\*VOL. II, 714]

\*No. 506.

*Advertisement by master as to liens and incumbrances, in a partition suit.*

See ante, p. 307.

[*Title of cause.*]

In pursuance and by virtue of an order of this court, made in the above cause, on the — day of — last, notice is hereby given to all persons having any general lien or incumbrance, by judgment or decree, or otherwise, on the undivided share or interest of any of the owners, in the premises hereinafter described, to produce to me the undersigned, one of the masters of this court, on or before the — day of — next, at my office in the village of W., in the county of —, proof of their respective liens and incumbrances, together with satisfactory evidence of the amount due thereon; and to specify the nature of such incumbrances, and the dates thereof respectively. The said premises are described in the bill of complaint as follows: [*insert description.*]

Dated, etc.

W. T. S., Sol. for comp't.

J. K. P., Master in chancery.

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No. 507.

*Master's report under order of reference as to title, etc., in a partition suit, that a sale is necessary.*

See ante, pp. 296, 307.

[*Title of cause.*]

To the Chancellor of the State of New York.

In pursuance of an order of this court made in the above cause, on the — day of — last, by which it was referred to one of the masters of this court, residing in the county of —, among other things, to take proof of the complainant's title and interest, in, and to the premises in the bill of complaint mentioned, and of the several

matters set forth in said bill, and to ascertain and report what share or part of the said premises belongs to each of the parties to the suit, so far as the same could be ascertained, and the nature and extent of their respective rights and interests therein, and an abstract of the conveyances by which the same are held; and also to inquire and report whether the said premises, or any lot or separate parcel thereof, are so circumstanced that an actual partition thereof cannot be made; and if the said master should arrive at the conclusion that a sale of the [\*VOL. II, 715] whole of said premises, or of any lot \*or separate parcel thereof will be necessary, that he specify the same in his report, together with the reasons rendering a sale necessary; and in such a case, that he also ascertain and report whether any creditor not a party to this suit, has a specific lien on the undivided share or interest of any of the parties in that portion of the premises which it is necessary to sell; and if no such lien should be found, that he further inquire and report whether the undivided share or interest of any of the parties in the premises, is subject to any general lien or incumbrance by judgment or decree; and that he ascertain and report the amount due to any party to this suit, who has either a general or specific lien on the premises to be sold, or any part thereof; and the amount due to any creditor, not a party, who has a general lien on any undivided share or interest therein, by judgment or decree, and who should appear and establish his claim on said reference; and if requested by the parties appearing before him on such reference, to ascertain and report the amount due to any creditor not a party to this suit, which is either a specific or general lien or incumbrance upon all the shares or interests of the parties in the premises to be sold, and which would remain as an incumbrance thereon, in the hands of the purchaser; I the subscriber, one of the masters of this court, residing in the county of —, to whom the execution of the said order was committed, do respectfully report—

That having been attended by the solicitors for the several parties who appeared in the cause, I proceeded to a hearing of the matters so referred, after having caused a notice to be published as required by law, for all general lien creditors, by judgment, decree, or otherwise, on the undivided share or interest of any of the parties in the premises to produce to me proof of their respective liens and incumbrances, together with satisfactory evidence of the amount due thereon, and to specify the nature of such incumbrances, and the dates thereof respectively.

I further report that on such hearing, I took proof as to the facts stated in the bill of complaint, and find that the material facts therein set forth are true.

And I further certify and report that the following is an abstract of the conveyances by which the premises described in the bill of complaint are held, that is to say (\*):—

No. 1.

P. D. to S. S. D.	}
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The last will and testament of P. D., the common source of title, who died seised—having been in possession, claiming to own the premises, more than twenty years. By such will he devised his [\*VOL. II, 716] \*real estate, as follows: “I give and bequeath unto my wife P., the use of the farm I now occupy and possess, during her natural life. I give and devise unto my son S. S. D. and his heirs, the farm I now occupy, after the death of his mother.” Dated January 22, 1829. The testator’s widow died in possession, August 3, 1842. Whereupon S. S. D., became seised of the premises in fee.

No: 2.

S. S. D. died on the 24th of January, 1842, intestate, and without issue. He left three sisters—E., wife of T. F., the complainant; S., widow of S. M.; R., widow of J. P.; and one brother, J. D., together with the children and representatives of N. D., a brother previously deceased. These representatives were C. D., M. D., G. D., E. wife of G. K. The intestate S. S. D., also left surviving, the representatives of J. A. W., a daughter of N. D., who died before said intestate, and whose surviving children and heirs were E. Y. W., and M. E. W., who are infants, and of the respective ages stated in the bill.

No. 3.

J. D. and S. his wife, to T. F., the compl't.	}
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Quit claim deed, conveying their undivided share of the 106 acres mentioned in the bill of complaint. Dated, October 17, 1842, acknowl-



edged by wife, and execution by J. D. duly proved. Consideration \$1,750.

The legal estate and interests of the parties in the premises are as follows :

T. F. the complainant, as grantee of J. D. and wife, is entitled to *one undivided fifth*.

T. F. the complainant, and E. his wife, in right of the said E., are entitled to *one undivided fifth*.

The defendant S. M. is entitled to *one undivided fifth*.

The defendant C. D. is entitled to *one undivided twenty-fifth*.

The defendant M. D. is entitled to *one undivided twenty-fifth*.

The defendant G. D. is entitled to *one undivided twenty-fifth*.

The defendants G. K. and wife, are entitled in right of the wife, to *one undivided twenty-fifth*.

The defendant E. Y. W. is entitled to *one undivided fiftieth*.

The defendant F. W. is entitled to *one undivided fiftieth*.

The estate is in the parties in fee, subject to the marital interests therein which appear above.

I further report, that the premises described in the bill of complaint, are so circumstanced, that in my opinion, a partition thereof (†) cannot be made without great prejudice to the owners thereof. The premises [\*VOL. II, 717] \*consist of about 106 acres of land, part of which is woodland. A part of the land is of inferior quality. It is about the proper size to be cultivated to advantage as a single farm. There is but one dwelling-house on the premises. These facts, in connection with the number of the owners in common, and the minuteness of the interests of the infants, being one-fiftieth each, render a partition very difficult, if not impracticable.

I further report, that I have caused the necessary searches to be made, and I find that no creditor, not a party to the suit, has any specific lien by mortgage, devise, or otherwise, upon the undivided share or interest of any of the parties in the premises; and that there is no general lien or incumbrance by judgment or decree upon the undivided share or interest of either of the parties in the premises.

And I further report that no creditor, not a party to this suit, having a general lien on any undivided share or interest in the premises, by judgment or decree, appeared before me on the said reference to establish his claim, in pursuance of the notice published by me as aforesaid.

All which is respectfully submitted.

Dated, etc.

J. K. P., Master in chancery.

## No. 508.

*Another form of master's report in a partition suit, under 178th rule.*

[As in No. 507 to the asterisk (\*), then continue thus,]

No. 1. *First parcel containing 74 acres of land.*

J. M. and M., his wife,	}
to	
L. H.	

Warranty deed, dated December 11, 1817. Consideration \$——. Duly acknowledged; and recorded June 15, 1837, in the clerk's office of —— county, in book E. E. of deeds.

No. 2. *Second parcel containing 20 acres and 24 perches of land.*

M. C. and W. B. C.	}
to	
L. H.	

Warranty deed, dated October 31, 1828. Consideration \$——. Acknowledged by grantors. Recorded, etc. [as above.]

No. 3. *Third parcel containing 20 acres.*

D. G.	}
to	
L. H.	

Warranty deed, dated February 15, 1814. Consideration \$——. Acknowledged same day. Recorded, etc. [as above.]

\*No. 4. *Fourth parcel, being a village lot in the village* [\*VOL. II, 718] *of B. in the county of ——*

J. R. and wife	}
to	
L. H.	

Warranty deed, etc. [as above.]

And I further report, that L. H., the father of the complainant, died intestate on or about ——, and seised in fee of the several lots, pieces

or parcels of land hereinbefore mentioned, and which are particularly described in the bill of complaint, subject to the incumbrances by mortgage hereinafter set out.

And I do further report, that the said L. H. died leaving the defendant R. H., his widow, and the complainant H. H. and the defendants A. H. and E., widow of B. C. deceased, his children, and S. H. and E. H. his grandchildren, (being the children of H. H. deceased, who was a son of L. H., and husband of the defendant S. H. H.) who are infants under the age of twenty-one years, his heirs-at-law.

And I do further report, that all of said defendants are of full age except the said S. H. and E. H.

And I do further certify and report, that the legal estate and rights of the several parties in the several lots of land and premises described in the bill of complaint are as follows :

The complainant H. H., and the defendants A. H. and E., widow of B. C. deceased, as children and heirs-at-law of the said L. H., are each seised of and well entitled to an estate in fee, as tenants in common with the infant defendants, of and in one equal undivided fourth ( $\frac{1}{4}$ ) part of the said premises, subject to the dower right of the defendant R. H. therein, and subject also to the mortgages held by the defendant J. M. C. upon certain lots or parcels thereof as hereinafter mentioned. And that the infant defendants S. H. and E. H., as the grandchildren and heirs-at-law of the said L. H., are each seised in fee as tenants in common with the other owners thereof of, in, and to an equal undivided half ( $\frac{1}{2}$ ) of one equal undivided fourth ( $\frac{1}{4}$ ) part of the said lands and premises subject also to the right of dower of the defendant R. H. therein, and also to the mortgages of the defendant J. M. C. upon certain lots or parcels thereof.

And I do further certify and report, that the defendant R. H., as widow of the said L. H. deceased, is entitled to her right of dower in all the lands and premises mentioned and described in the bill of complaint ; which right is not subject to any claim, contribution, or incumbrance ; excepting the village lot in B. called No. 4 ; which is subject to the mortgage held by the defendant J. M. C., and her dower right in that lot is only in the equity of redemption, or surplus.

\*And I do further report, that the defendant J. M. [\*VOL. II, 719] C., holds a mortgage executed by the said L. H. in his lifetime, upon what is called the "Homestead," being the lot or parcel designated above as No. 1, dated, etc. Which mortgage is accompanied by a bond of the same date. Said mortgage is a lieu upon the whole of said

lot or premises, subject to the said R. H.'s right of dower therein. And the said J. M. C.'s claim to have the same satisfied out of such premises is paramount to all others, except the said claim for dower. And I do further report, that there is due to the said J. M. C. at the date of this my report, for principal and interest on the said bond and mortgage, the sum of \$—.

And I do further report, that the schedule hereto annexed marked A. and forming a part of this my report, contains a statement and account of the principal and interest moneys due upon such bond and mortgage, the period of the computation of interest, and its rate; to which for greater certainty I refer.

And I do further report, that the said defendant J. M. C., holds a mortgage upon the lot of land situate in the village of B. above designated as No. 4, dated, etc.; which mortgage is accompanied by a bond of the same date; both of which were executed by the said L. H., in his lifetime. This mortgage is a lien upon the entire interest in the said lot, and is prior and paramount to all others; having been given for the purchase money of said premises. And the dower claim of the said R. H. being secondarily entitled to satisfaction out of the proceeds of the sale of the said lot.

And I do further report, that there is due to the said J. M. C. at the date of this my report, for principal and interest on the bond and mortgage last above mentioned, the sum of \$—. And that schedule B. hereto annexed, and making a part of this my report, contains a statement and account of the principal and interest moneys due upon such bond and mortgage, the period of the computation of interest, and its rate; to which for greater certainty I refer.

And I further report, that no creditor, not a party to this suit, having a general lien on any undivided share or interest in the premises by judgment or decree, appeared before me on the said reference to establish his claim, in pursuance of the notice published by me as aforesaid.

And I further certify and report that the said several lots of land and premises are so circumstanced that an actual partition thereof cannot be made without great prejudice to the owners thereof, for the following reasons: [*state reasons.*] I am therefore of opinion that a sale of the whole of the said land and premises is necessary and expedient.

\*And I do further report that I have caused the [\*VOL. II, 720] necessary searches to be made, and find that no creditor not a party

to this suit has any specific lien, by mortgage, devise, or otherwise, upon the undivided share or interest of any of the parties in the premises; and that there is no general lien or incumbrance, by judgment or decree, upon the undivided share or interest of either of the parties in the premises.

All which is respectfully submitted.

Dated, etc.

J. M. A., Master in chancery.

*Schedule A. referred to in the preceding report.*

One bond dated, etc.

*Schedule B. referred to in the preceding report.*

One bond dated, etc.

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No. 509.

*Decree directing a sale in partition suit.*

See ante, p. 298.

At, etc. [*as in No. 255.*]

[*Title as in No. 2.*]

This cause having been brought on to be heard on the complainant's bill taken as confessed by the defendants R. H., A. H., E. C., S. H. and J. M. C., and upon the general answer of the guardian ad litem of the infant defendants E. H. and S. A. H., and upon the report of J. M. A., one of the masters of this court, and the papers included in and making a part of said report, which report bears date, etc., and after hearing W. A. B., of counsel for complainant, and C. M. D., of counsel for the guardian ad litem of the infant defendants, and due deliberation being thereupon had, it is ordered that the said report be and the same is hereby approved, ratified and confirmed. And it is further ordered, adjudged, declared and decreed, and this court by virtue of the power and authority therein vested doth order, adjudge, declare and decree, that the parties to this suit, except the defendant J. M. C. and S. H., are seised of and entitled to the lands, tenements and hereditaments in the bill of complaint in this cause mentioned, and hereinafter described, with the appurtenances, as tenants in common thereof, in fee simple; and that the respective rights and interests of the said parties complainant and defendants, therein, are such

as are ascertained and stated by the said master in his report aforesaid; that is to say: The complainant H. H. and the defendants A. H. and E. widow of B. C., deceased, as children and heirs-at-law of L. H., are each seised in fee simple as tenants in common with the infant [\*Vol. II, 721] defendants S. A. H. and \*E. H., and well entitled to one-fourth part of the said lands and tenements subject to the dower right of the defendant R. H. widow of the said L. H. therein, and subject also to the mortgages held by the defendant J. M. C. on certain lots or parcels thereof as hereinafter mentioned. The infant defendants S. A. H. and E. H. as children and heirs-at-law of H. H., a deceased son of the said L. H., are each seised in fee simple, as tenants in common with the other owners thereof, of, in and to an equal undivided half of one equal undivided fourth part of the said lands and tenements, subject also to the right of dower of the said defendant R. H. therein and to the mortgages of the defendant J. M. C. on certain lots or parcels thereof. The defendant R. H., as widow of the said L. H., deceased, is entitled to her right of dower in the said lands and tenements, not subject to any claim, contribution or incumbrance, excepting on the lot of land and premises situate in the village of B., in the said master's report designated as No. 4, which is subject to a mortgage held by the defendant J. M. C., and which said mortgage being for the purchase money, is entitled primarily to satisfaction out of the proceeds of the sale of said lot No. 4. The interests of the complainant and of the defendants A. H., E. C., and the infant defendants S. A. H. and E. H. in the premises designated in said master's report as the "Homestead," and called No. 1, are incumbered by a mortgage to the defendant J. M. C., on which there was due at the date of the said report the sum of \$——. The interests of all the parties in the lot of land and premises situate in the village of B. and called No. 4, are incumbered by a mortgage to the defendant J. M. C., on which there was due at the date of said report the sum of \$——; which said mortgage is primarily entitled to be satisfied out of the sale of said lot No. 4.

And it is further ordered and decreed, that all and singular the premises mentioned in said bill of complaint, and therein described as follows: [*insert description;*] together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, be sold at public auction in the county of ——, where such premises are situated, by and under the direction of one of the masters of this court residing in that county; that the said several

parcels, as designated by numbers in the said master's report, be sold separately or in such portions as to the master may seem most for the interest of the parties interested therein; that the said master give six weeks previous notice of the time and place of such sale, in one of the public newspapers printed in the county of —, where the said premises are situated, and in such other manner as is required by law and the rules and practice of this court; that the master be at liberty [\*VOL. II, 722] to receive such an amount \*down, on the sale, and give such credit for the balance, taking security for the payment of the same, as he may think proper, and as may be consistent with the provisions and directions herein contained. And that the complainant, or any of the parties in this cause, may become the purchaser or purchasers thereof. That the master, forthwith after said sale, make report thereof to this court; and after this decree shall have been enrolled, and his report of sale shall have been duly confirmed, then that he execute a deed or deeds of the said premises to the purchaser or purchasers at the said sale, on their complying with the conditions upon which the deeds were to be delivered; and that such sale and conveyance be valid and effectual forever. And it is further ordered, that the costs of all the parties to this suit, to be taxed, be first apportioned between the said several parcels of land and premises, ratably, and paid out of the proceeds of the sale thereof, in proportion to the sums for which they respectively sell; the same to be paid to the solicitor for the complainant, and to the guardian ad litem of the infant defendants, or his solicitor. And that the master in like manner retain out of the proceeds of the sale of each, the fees, commissions, and disbursements to which he is entitled on such sale. That the said master do also pay and discharge, out of the proceeds, all taxes, charges, and assessments which may be a lien upon the said premises, or any part thereof; and if the same are upon a part only, then that such master pay the same out of the proceeds of such part, and specify the same in his final report. That such master pay to the defendant J. M. C. the amount reported due him upon his specific lien or mortgage on the lot in the village of B., called No. 4, with interest from the date of said report, out of the net proceeds of the sale of said lot, prior to the payment of R. H.'s dower claim therein.

And it is further ordered and decreed, that the said master ascertain and report whether the defendant R. H. is willing to accept, in lieu and instead of her dower interest in the said premises, a sum in gross, in satisfaction thereof, out of the net proceeds of the said premises,

according to her rights as ascertained in said master's report, and what would be a reasonable satisfaction for her said interest, on the principles applicable to life annuities. And if the said R. H. consents to accept such gross sum, that such master pay the same to her, upon her executing, acknowledging and delivering to him a release to be approved of by such master of all her right, title and interest of, in, and to the said premises, and every part thereof. But if she shall refuse to accept a gross sum in lieu of her dower interest, then it is further ordered, that the said master, after paying the costs and [\*VOL. II, 723] disbursements, and assessments, \*and the amount due to the defendant J. M. C. upon his mortgage on the said lot No. 4, as specified in said report, do bring one-third of the net proceeds of the said sale into this court, to be invested by the register [*or clerk*] for her benefit; the interest or dividends thereon, or to accrue thereon, to be paid over to her during her natural life.

And it is further ordered and decreed, that out of the proceeds of the above firstly described lot of land and premises, after paying the costs and disbursements, taxes and assessments aforesaid, and after paying the widow the amount of her dower right therein, either in gross or by depositing the same as aforesaid, the said master pay to the defendant J. M. C. the amount reported due him upon his mortgage on said lot, with interest, or so much thereof as the residue of the proceeds of the said firstly described lot will pay of the same. And in case the residue of the proceeds of said lot shall be insufficient to pay the amount reported due to the said J. M. C., with interest as aforesaid, that the master specify the amount of such deficiency, in his report of such sale.

And it is further ordered and decreed, that the said master divide the residue of the net proceeds of the sales of the said several lots of land and premises, into four equal parts, and that he bring into this court and deposit with the register [*or clerk*] thereof, one of the said equal fourth parts of such residue, being for the shares of the said infant defendants E. H. and S. A. H.

And it is further ordered, that the said master pay to the complainant H. H., one of the said equal fourth parts of said residue; to the defendant A. H., one other of the said equal fourth parts of said residue; and to the defendant E. C., the remaining equal fourth part of the residue of said net proceeds. And that the master take receipts for all such payments, and file them, with his report to be made of his proceedings subsequent to the confirmation of his report of sale.



And it is further ordered, that such title-deeds and writings as may be in the possession or under the control of any or either of the parties, and as appear to relate solely to any particular part of the said premises, be delivered up to any person or persons who may, on such sale, become the purchaser or purchasers thereof. And that all other title-deeds or writings may be deposited with the clerk in chancery, for the — circuit, for safe custody, there to remain for the benefit of all parties interested therein.

And it is further ordered and decreed, that the purchaser or purchasers of any or either of said lots or parcels of land, at such sale, be let into possession thereof; and that any of the parties in this cause, who may be in possession of said premises, or any part thereof, and [\*VOL. II, 724] any person \*who, since the commencement of this suit, has come into the possession of them, or either, or any, of them, deliver possession thereof to such purchaser or purchasers, on production of the master's deed for such premises.

And it is further ordered, that the said master make a report of his proceedings under this decree, subsequent to the confirmation of his report of sale to be made as above directed.

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No. 510.

*Master's report of sale in a partition suit.*

See ante, p. 310.

[*Title of cause.*]

To the Chancellor of the State of New York.

In pursuance of a decretal order of this court, made in the above cause, and dated the — day of — last, I, the subscriber, one of the masters of this court, residing in the county of —, to whom the execution of the said order was confided, do report:

That having caused a notice of the time and place of sale of the premises mentioned in said decretal order, containing a brief description thereof, to be published once in each week for six weeks immediately previous to such sale, in one of the public newspapers printed in the county of —, where such premises are situated, and having also caused a copy of such notice to be put up at three of the most public places in the town of —, where the said premises are situated, I did, on the — day of —, at 10 o'clock in the forenoon, that being the

time specified in the said notice, attend at the American Hotel, in the village of —, the place therein mentioned, and exposed the said premises for sale, at public auction to the highest bidder, as directed by said decretal order.

I do further report, that the several lots or parcels of land so directed to be sold as aforesaid, were put up for sale separately, and were each and every of them struck off to J. K., for the following sums: Lot No. 1, for the sum of \$—; lot No. 2, for the sum of \$—; lot No. 3, for the sum of \$—; and lot No. 4, for the sum of \$—; those sums being the highest sums bidden for the said lots respectively, and the said J. K. being the highest bidder therefor; which several sums amount in the aggregate to \$—.

That the terms and conditions of such sales were reduced to writing, and made known to the persons attending such sale, previous to putting [\*VOL. II, 725] \*up the said lots, and were as follows: the purchaser or purchasers of each lot or separate parcel, were to pay ten per cent. of the purchase money down, on the day of sale, and the residue when the sale should be confirmed and the deed delivered. And that the said J. K. has signed the written conditions of sale above mentioned, together with an acknowledgment that he has purchased the premises upon those terms. And he has paid to me the amount required to be paid down.

All which is respectfully submitted.

Dated, etc.

J. K. P., Master in chancery.

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No. 511.

*Master's deed in a partition suit.*

See ante, p. 310.

This indenture made this — day of —, in the year of our Lord one thousand eight hundred and forty-four, between J. K. P., one of the masters in chancery of the state of New York, residing in — county, of the first part, and J. K., of the second part: Whereas, at a court of chancery, held for the State of New York, at the city of

Albany, on the — day of —, 1843, before the [*vice*] chancellor [*of the 3d circuit*] it was among other things ordered, adjudged, and decreed by the said court, in a certain cause depending in said court, between — complainant, and — defendants, that all and singular the premises mentioned in the bill of complaint in said cause, and hereinafter described, together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, should be sold at public auction in the county of —, where such premises are situated, by and under the direction of one of the masters of this court, residing in that county; after such master had given the public notice of the time and place of sale specified in such order, and required by law and the rules and practice of said court. And whereas the said J. K., a master in chancery, residing in said county of —, and party of the first part to these presents, in pursuance of the said order and decree of the court of chancery, did, on the — day of — instant, sell at public auction, at the American Hotel, in the village of —, the premises mentioned in the said order, after having given public notice of the time and place of such sale, and a brief description of the said premises, in conformity with the order afore-[\*Vol. II, 726] said. And whereas, at such sale the said \*premises were struck off to, and purchased by, the said party of the second part to these presents, at and for the sum of — dollars; that being the highest sum bidden for the same.

Now therefore this indenture witnesseth, that the said party of the first part, master in chancery as aforesaid, in order to carry into effect the sale so made in pursuance of the said decree of the court of chancery, and also by virtue of the statute in such case made and provided, and in consideration of the sum of — dollars to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, release, convey, and confirm unto the said party of the second part, and to his heirs and assigns forever, all that [*insert description of land;*] together with all and singular the rights, titles, privileges, members, hereditaments and appurtenances thereunto belonging, or in anywise appertaining. To have and to hold all and singular the premises above mentioned and described unto the said party of the second part, his heirs and assigns; to the sole and only proper use, benefit, and behoof of the party of the second part, his heirs and assigns forever.

In witness whereof the said party of the first part, master in chancery as aforesaid, has hereunto set his hand and seal the day and year first above written.

Sealed and delivered }  
in presence of }

[*Acknowledgment in usual form.*]

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No. 512.

*Final report of master, after sale, in a partition suit.*

See ante, p. 310.

At, etc. [*as in No. 255.*]

[*Title of cause.*]

To the Chancellor of the State of New York :

In pursuance of a decretal order of this court, made in the above cause on the — day of — last, I, the subscriber, one of the masters of this court, do respectfully report—

That in obedience to the said decretal order, I have executed, acknowledged, and delivered to J. K., the purchaser of the premises directed to be sold by me, a deed of such premises, on receiving from him the sum of — dollars, the price or sum for which the said premises were sold to him, as mentioned in my former report of such sale, made in pursuance of the said decretal order, and bearing date the— [*\*VOL. II, 727*] day of \*— last, and upon his complying with all the conditions upon which the said deed was to be delivered.

And I further report that I have paid to the solicitor for the complainant in this cause, the sum of \$— for the costs of the complainant in this suit as taxed, and have taken a receipt therefor, which is hereto annexed ; that I have paid to the solicitor of G. M. D., Esq., the guardian ad litem of the infant defendants, the sum of \$—, being the amount of his costs as taxed, and have taken a receipt therefor, which is hereto annexed ; that I have retained in my hands the sum of \$—, being the amount of my fees, commissions and disbursements on said sale ; that I have paid to the collector of the town of —, the sum of \$—, for taxes upon the said premises ; that I have paid to the defendant J. M. C., the sum of \$—, being the amount reported due to him upon his mortgages on the said premises. And

that the defendant R. H. being willing to accept, in lieu of her dower interest in the said premises, a sum in gross, in satisfaction thereof, out of the net proceeds of the said premises, I computed the value of her said dower interest, upon the principle of life annuities, and ascertained the same to be \$——. And the said R. H. consenting to accept that sum, I have paid the same to her, and have taken from her a release duly executed and acknowledged, and approved by me, of all her right, title and interest of, in and to the said premises and every part thereof, which release is hereto annexed.

And I further report that the residue of the net proceeds of the sale of the said premises, after deducting the payments and sums above mentioned, amounts to \$——; which sum I have divided into four equal parts, each of which amounts to \$——; one of which parts I have brought into this court and deposited with the register thereof, being for the shares of the infant defendants E. H. and S. A. H.; one other of which parts I have paid to the complainant H. H.; one other part to the defendant A. H., and one other part to the defendant E. C.; and that I have taken from the said complainant and defendants receipts for the amount of their respective shares as aforesaid, which are hereto annexed.

And I further report that I have let the said J. K. into the possession of the premises so purchased by him.

All which is respectfully submitted.

J. K. P., Master in chancery.

Dated, etc.

[\*Vol. II, 728]

\*No. 513.

*Order nisi for confirmation of No. 512.*

At, etc. [as in No. 255.]

[*Title of cause.*]

On reading and filing the report of J. K. P., one of the masters of this court bearing date ——, stating that he has executed and delivered to the purchaser of the premises sold by him pursuant to the decretal order of this court, made on the —— day of ——, a deed thereof, and that he has distributed the net proceeds of the sale of said premises in the manner directed in the said decretal order, and as particularly specified in such report; to which report are annexed the

receipts and releases of the several persons to whom the said net proceeds have been paid ; on motion of W. T. S., solicitor for the complainant, ordered that the said report be confirmed, unless cause to the contrary be shown within eight days from the time of entering this order.

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No. 514.

*Master's report, on a reference under 177th and 178th rules, that a partition can be made.*

See ante, p. 297.

[*Title of cause.*]

To the Chancellor of the State of New York.

In pursuance of an order of this court, made in the above cause, on the —— day of —— last, by which it was referred to me to take proof of the complainant's title and interests in and to the premises in the bill of complaint in this cause mentioned, and of the several matters set forth in said bill ; and to ascertain and report what share or part of the said premises belongs to each of the parties to this suit, so far as the same could be ascertained, and the nature and extent of their respective rights and interests therein, and an abstract of the conveyances by which the same are held ; and also to inquire and report whether the said premises, or any lot or separate parcel thereof are so circumstanced that an actual partition thereof cannot be made, I, the subscriber, one of the masters of this court do report—

That having been attended by the solicitors for the several parties who appeared in the cause, I proceeded to a hearing of the matters so referred.

\*I further report, that on such hearing I took proof [\*VOL. II, 729] as to the facts stated in the bill of complaint, and find that the material facts therein set forth are true.

And I further certify and report, that the following is an abstract of the conveyances by which the premises described in the bill of complaint are held, that is to say : [*as in No. 507, from the (\*) to the (†), then add.*] can be made without material injury to the rights or interests of the several owners thereof ; and that a partition of such premises would be more advantageous to such owners than a sale thereof.

All which is respectfully submitted.

Dated, etc.

J. K. P., Master in chancery.

## No. 515.

*Decretal order for partition and appointing commissioners.*

At, etc.

[*Title of cause.*]

This cause having been brought on to be heard upon the report of J. C., one of the masters of this court, dated, etc., whereby the said master reported that the premises mentioned in the bill of complaint in this cause may be partitioned and divided into four equal parts, without material injury to the rights or interests of the several owners thereof, and that a partition of such premises would be more advantageous to such owners than a sale thereof; and whereby the said master also reported that the complainant J. Y. is entitled in fee to one equal undivided fourth part of the said premises; the defendant S. C. to one equal undivided fourth part thereof; the defendant N. M. to one equal undivided fourth part thereof; and that the defendant W. L. is entitled to the remaining undivided fourth part thereof. On motion of H. A., of counsel for the said complainant, no one appearing to oppose, after due notice, it is ordered, adjudged and decreed, and this court, by virtue of the power and authority therein vested, pursuant to the statute in such case made and provided, doth order, adjudge and decree, that the said master's report be, and the same is hereby ratified and confirmed.

And it is further ordered, declared and decreed, that the rights and interests of the several parties to this suit of, in and to, the several lots, pieces or parcels of land described in the bill of complaint in this cause, are as stated and set forth in the said master's report.

\*And it is further ordered, adjudged and decreed, [\*VOL. II, 730] that partition be made of the lands and premises mentioned and set forth in the bill of complaint in this cause, which premises are described as follows: [*insert description*] among the parties to this suit according to their respective rights and interests therein as the same were reported by said master and have been thus ascertained by this court and established by this decree. And it is further ordered, that W. A. H., B. R. and S. P., three reputable freeholders of the county of — be, and they are hereby appointed commissioners for the purpose of making such partition. That the said commissioners, before proceeding to the execution of their duties, as such, shall be severally sworn or affirmed before some officer authorized by law to administer oaths, honestly and impartially to execute the trust reposed in them,

and to make partition as directed by this court. And that such oaths or affirmations be filed with the clerk of this court at or before the coming in of the report of the said commissioners hereinafter directed to be made. And that the said commissioners shall divide the said lands and premises into four equal parts, quantity and quality relatively considered, and that they allot to the complainant one of the said equal fourth parts of said premises; to the defendant S. C., one other of the said equal fourth parts; to the defendant N. M., one other of the said equal fourth parts; and to the defendant W. L., the remaining equal fourth part; to be held and enjoyed by the said parties in severalty according to their rights and interests therein so ascertained and determined as aforesaid. And that the said commissioners shall designate the parts or portions so allotted to each of the said parties, and the boundaries thereof, by sufficient descriptions and monuments.

And it is further ordered, that the said commissioners make a full and ample report to this court of their proceedings in this behalf, under their hands, or under the hands of any two of them, specifying therein the manner in which they shall have executed this decree, and describing the lands divided, and the parts or shares allotted to each party, with the quantity, courses and distances of each share, and a description of the posts, stones or other monuments thereof, and the items of their charges in the premises. That the said commissioners, or such two of them as shall sign the said report, do acknowledge the same, or cause it to be proven in the same manner that deeds are required to be acknowledged or proven, to entitle them to be recorded, before some officer authorized to take the proof or acknowledgment of deeds, and that such report be filed in the office of the clerk of this court. That all the said commissioners do meet together in the performance of any of their duties under this decree, but that the acts and decisions of a majority of such commissioners, when so met, shall be valid.

And it is further ordered, that the said commissioners be authorized to employ a surveyor, and to cause all necessary maps and surveys to be made. And all the parties in this cause shall produce to, and leave with, the said commissioners, for such time as the commissioners shall deem reasonable, all deeds, writings, surveys or maps relating to the said premises or any part thereof.

And it is further ordered, adjudged and decreed, that in case partition of such premises cannot be made with perfect equality between



the said parties, according to their respective rights and interests therein, unless compensation be made by one or more of the said parties to the other of them, for equality of partition, that then and in that case the said commissioners, or such two of them as may make said partition, ascertain and report the proper compensation which ought to be made for equality of partition; and by which of the parties the same should be paid, and to which the same ought to be allowed. But the said commissioners shall not report compensation to be paid by an infant, for equality of partition, unless it satisfactorily appears to them that he or they have sufficient personal estate to pay the same and his or their shares of the costs and expenses of this suit, and all other liens on his or their share of the premises; except in cases where, from the situation of the property and of the interests of the parties, it cannot be charged upon the share of an adult.

And it is further ordered, that a commission issue out of and under the seal of this court directed to the said W. A. H., B. R. and S. P., authorizing and directing them, or any two of them, to make partition of the said premises in the manner above directed.

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No. 516.

*Commission for partition.*

See ante, p. 298.

The people of the State of New York to D. B., C. W. and [L. s.] W. K., all of the county of —, greeting: Whereas at our court of chancery held for the State of New York, before our vice-chancellor of the fourth circuit, at —, on the — day of —, a certain decretal order was made by the said court, in a certain cause depending in said court wherein S. G. was complainant, and J. G. defendant, by which it was, among other things, ordered that a partition [\*VOL. II, 732] \*of the premises mentioned and described in the bill in this cause, should be made between the said complainant and defendant in equal portions, quality and quantity relatively considered. And whereas by said decretal order it was further ordered that in case the said partition could not be made equal between the said parties, without prejudice to the rights and interests of one of them, that then and in such case compensation should be made by one of the said

parties to the other, for equality of partition, according to the equity of the case. And whereas it was, in and by the said decretal order further ordered that a commission issue out of and under the seal of this court, to you to be directed, authorizing and directing you to act in the premises for the purpose of carrying the said decretal order into effect: Now, therefore, know ye, that confiding in your prudence and discretion, we have assigned and appointed you the said D. B., C. W., and W. K., commissioners for the purposes herein mentioned; and do give you, or any two of you, full power and authority to make partition of the premises above mentioned and hereinafter set forth and described, between the said S. G. and the said J. G., according to their respective rights and interests therein, as the same have been ascertained, declared, determined and adjudged in and by the decretal order aforesaid; and that you, the said commissioners, or such two of you as may make the said partition, make a report under your hands to our said court of chancery of your proceedings under and by virtue hereof, without unnecessary delay. And we do, by these presents further authorize, direct and require you, or such two of you as may make the said partition, that in case the same cannot be made equal between the said parties, without prejudice to the rights and interests of one of them, unless compensation be made by one of the said parties to the other for equality of partition in the said premises, that then, and in such case you, or such two of you as may make such partition, ascertain what compensation or compensations ought to be made by such one of the said parties respectively, who ought to make the same to such one of the said parties respectively, to whom the same ought to be made for equality of partition, according to the equity of the case; and that you, or such two of you as may make the said partition, allot and award such compensation or compensations to be made accordingly. And that in your said report and return you certify and declare the compensation or compensations, or sum or sums of money you or such two of you as may make the said partition, may ascertain, allot, and award to be made by and to the parties respectively, and by whom the same shall be made, and to whom the same shall be awarded. And we do hereby further order and direct that you, [\*VOL. II, 733] or such two of you \*as shall act in the premises, by virtue of the said decretal order, and of this commission, do, for the better understanding and more clear elucidation of the shape and situation of the said premises, and of the manner in which such partition shall be made, make, or cause to be made, and annex to, and return with this

commission, a map of the whole of the said premises, showing clearly and distinctly the division which you shall make of the premises. And the better to enable you to make the partition and perform the duties above directed, you and each of you are and is hereby authorized and empowered to enter into and upon, and view the said premises, and every or any part thereof, together with such surveyors and assistants as you may deem necessary; and to survey the same, or cause the same to be surveyed, for the purposes aforesaid; which said premises are described as follows: [*insert description.*]

Witness, Reuben H. Walworth, chancellor of our said state, at —, this — day of —, one thousand eight hundred and forty-three.

E. T. M., Sol. for compl't.

G. M. D., Clerk.

*Indorsed.*

The execution of the within commission appears by the report hereto annexed.

Dated, etc.

B. B. }  
C. B. } Commissioners.  
W. K. }

No. 517.

*Oath of commissioners.*

See ante, p. 298.

We, D. B., C. W. and W. K., the commissioners within named, do severally swear that we will honestly and impartially execute the trust reposed in us by the within commission, and make partition as therein directed by the court.

Subscribed and sworn }  
this — day of — }  
1843, before me, }

D. B. }  
C. B. } Commissioners.  
W. K. }

J. R., Justice of the peace.

[\*VOL. II, 734]

No. 518.

*Report of commissioners in partition.*

See ante, p. 300.

[*Title of cause.*]

To the Chancellor of the State of New York.

In pursuance of, and in obedience to a commission in the above entitled cause, issued out of and under the seal of this court, and directed and delivered to the undersigned commissioners therein named, tested the — day of —, 1843, which said commission is hereto annexed; we the said commissioners do hereby respectfully report and return:

That having been first duly sworn, and having severally taken the oath hereto annexed, we have carefully examined the premises described in said commission, and caused them to be surveyed in our presence, and have made partition thereof between the said parties, according to their respective rights and interests therein, as the same have been ascertained, declared, and determined by the said court, as we were by the said commission commanded, in manner following: We divided the whole of the said premises into two allotments, which are designated on the map hereto annexed, by the letters A. and B.; each of which allotments is in our opinion, of equal value, and that being in our judgment, the most beneficial division, all circumstances considered, that could be made of such premises. And that we have set off in severalty to the said J. G., all that certain parcel of said premises designated on the said map by the letter A., and which is bounded as follows: [*insert description,*] as will more fully appear by reference to the said map.

And we have also set off in severalty to the said S. G., all those certain pieces or parcels of said premises, designated on the said map by the letter B., which are bounded as follows: [*insert description,*] as will also more fully appear by reference to said map.

And we further certify and report, that the items of the various expenses attending the execution of the said commission, including our fees as commissioners, are contained in a schedule hereto annexed, marked A., and forming a part of this our report. And that for the better understanding, and more clear elucidation of the shape and situation of the said premises, and of the manner in which such partition has been made by us, we have caused to be made a map thereof, showing what parts of the said premises have been allotted to the

respective parties; which map forms a part of this our report, and is hereto annexed marked B.

In witness whereof, we the said commissioners have set our hands to [\*Vol. II, 735] \*this our report, this — day of —, in the year of our Lord one thousand eight hundred and forty-three.

D. B. }  
C. W. } Commissioners.  
W. K. }

To be acknowledged in the same manner as a deed.

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No. 519.

*Notice of hearing on report of commissioners in partition, and for final decree.*

[*Title of cause.*]

Sir:

Take notice, that this cause will be brought to a hearing, upon the report of the commissioners appointed to make partition of the premises mentioned in the bill of complaint in this cause, and for a final decree, at the next term of this court, to be held at —, on the — day of — next, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard.

Dated, etc.

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No. 520.

*Final decree for actual partition.*

See ante, p. 301.

At, etc. [*as in No. 255.*]

[*Title of cause.*]

This cause having been brought on to be heard upon the report of D. B., C. W. and W. K., commissioners appointed therein, under and by virtue of a commission issued out of, and under the seal of this court; and on reading and filing said report, which bears date the — day of —, by which it appears that the said commissioners

have made partition of the premises described in the bill of complaint in this cause, between the said S. G. and J. G., according to their respective rights and interests therein, as the same have been ascertained, declared and determined by this court, and by which said partition the said commissioners have divided the whole of the said premises into two allotments, of equal value, and have set off in severalty to the said J. G., one of the said allotments, bounded and described as follows: [*insert description,*] as will more fully appear by a map of said partition thereto annexed. And also by which parti- [\*Vol. II, 736] tion the said commissioners \*have set off in severalty to the said S. G., the other of the said allotments, which is bounded and described as follows: [*insert description,*] as will also more fully appear by reference to the said map of the partition annexed to such report. And on motion of G. B. J., of counsel for the complainant, it is ordered, adjudged and decreed, and this court, by virtue of the authority therein vested, doth order, adjudge and decree, that the said report, and all things therein contained, do stand ratified and confirmed, and that the partition so made, be firm and effectual forever. And it is further ordered, adjudged and decreed, that the said S. G. and J. G., do each execute, under their hands and seals, and acknowledge and deliver to the other, a deed of release and quit claim of the parcels of land set off to each in severalty as aforesaid. And it is further ordered, adjudged and decreed, that the said J. G. pay to the said S. G., the one-half of the costs and charges of the proceedings in this cause; and that the said S. G. have execution therefor.

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No. 521.

*Another final decree for partition.*

At, etc.

[*Title of cause.*]

This cause coming on to be heard, on the report of L. M., N. O. and P. Q., the commissioners appointed by and under an order of this court, bearing date at the village of W., on the — day of —, one thousand eight hundred and forty-three, appointing them commissioners to make partition, quantity, quality and value relatively considered, of the land and premises mentioned and described in the

complainant's bill of complaint, amongst the several parties complainants and defendants in this cause, according to their several rights and interests therein, as was in said order set forth. Thereupon, on reading and filing the report of the commissioners so appointed as aforesaid, from which it appears that after the said appointment they did severally take and subscribe an affirmation before an officer duly authorized to administer the same, honestly and impartially to execute the trust reposed in them as such commissioners as aforesaid; and that after taking and subscribing the said affirmation they proceeded to view the lands and premises mentioned in said order; and after first causing the same to be carefully surveyed, and a field book and map thereof made by a surveyor, by them employed for that purpose, which field book and map was annexed and referred to in said report, they proceeded to divide the said lands and premises among the several complainants and defendants according to their respective rights and interests therein, quantity, quality and value relatively considered, [\*Vol. II, 737] \*and did thereupon allot, assign and set apart to the said G. T. the one equal undivided third part, to the said G. G. the one equal undivided third part, and to the said L. G. C. the one equal undivided third part, as tenants in common of all those certain lots described in the said field book, and laid down and distinguished on the said map as lots numbers [*insert description of land.*]

That they did also set apart, allot and assign to the said L. G. C. the one equal undivided half part, and to the said G. G. the other one equal undivided half part as tenants in common of all those certain lots described in said field book, and laid down and distinguished on said map as [*insert description of lands.*]

That they did also allot, assign and set apart to the said G. T., to hold in severalty, all those certain lots described in the said field book, and laid down and distinguished on the said map as lots [*insert description of land.*]

That they did also set apart, allot and assign to the said E. W. T., to hold in severalty, all those certain lots described in the said field book and laid down and distinguished on said map as lots [*insert description of land.*]

That they did also set apart, allot and assign to the said M. M. T., to hold in severalty, all those certain lots described in the said field book, and laid down and distinguished on said map as lots [*insert description of land.*]

That they did also set apart, allot and assign to the said S. M. T.,

to hold in severalty, all those certain lots described in the said field book, and laid down and distinguished on said map as lots [*insert description of land.*]

That they did also allot, assign and set apart to the said G. T., L. G. C. and G. G., as tenants in common, each the one equal undivided third part of all that strip or tract of land described in said field book, and laid down and marked on said map as the contemplated west canal to be by them the said G. T., L. G. C. and G. G., their heirs and assigns, used, improved and occupied in whole or in part as a canal for hydraulic purposes, at such time and times as they may think fit and proper so to use and improve the same, subject however to be used, occupied and enjoyed as a public street or highway until the same shall be taken, used and improved as a canal for hydraulic purposes by the said G. T., L. G. C. and G. G., or their heirs or assigns.

That they did also allot, assign and set apart the said strip or tract of land described in said field book, and laid down and marked on said map as a contemplated hydraulic canal, as a public street or high-[\*VOL. II, 738] way, \*and as part of Canal street as described in said field book, and laid down and marked on said map, making said Canal street one hundred and twenty feet wide, giving, saving and reserving to the said several parties the right to improve, use and occupy the said last mentioned strip or tract of land as a canal for hydraulic purposes by the said several parties, their heirs or assigns, opposite the said several lots set apart, allotted and assigned to them respectively, at such time and times as they or either of them may think fit and proper so to use and improve the same.

From which said report it also further appears that in making the partition aforesaid, the said commissioners assigned, allotted and set apart to E. W. T., M. M. T. and H. T., respectively, who are not in a situation to improve their shares in the manner mentioned in the said report of the said commissioners, other equivalent portions of the said premises in proportion and equivalent to their several respective rights and interests in the said premises, quality, quantity and value respectively considered, and that they, the said commissioners, were able to make the shares of the respective parties in their judgment equal and proportionate to their several respective rights and interests in the said premises, without requiring any sum or allowance to be paid or allowed by any or either of the parties, to any or either of the said party or parties for equality of partition.

From all which it satisfactorily appears to this court that the report



of the said commissioners, and the partition so by them made as aforesaid, is in all respects equitable and just.

And on reading and filing a notice of the hearing upon said report, and an admission signed by H. P. H., Esq., as counsel for the said G. T., D. B., as solicitor for the defendants G. G. and L. G. C., and J. B. L., solicitor for J. M. D., register of this court and guardian ad litem of the said defendants H. T., E. W. T. and M. M. T., of service of said notice on them respectively, and on motion of S. G. H., Esq., of counsel for the complainants, no person appearing for said defendants, it is ordered, adjudged and decreed, and the chancellor, by virtue of the power and authority of this court, and in pursuance of the statute in such case made and provided, doth hereby order, adjudge and decree that the said report be confirmed, and that the said partition made by the commissioners of partition in this cause, be in all respects ratified and confirmed; and the same is hereby approved and ratified; and it is further ordered and decreed that the said partition be firm and effectual forever.

And it is further ordered, adjudged and decreed that the costs of the [\*Vol. II, 739] \*several parties in this suit, to be taxed, including all reasonable charges and expenses incurred to effect the partition in this cause, to be allowed by one of the taxing masters of this court, and which are taxable as between party and party, shall be borne and paid by the complainants and defendants as follows, viz.: the said G. T. one third part thereof, the said G. G. and L. G. C. each one sixth part thereof, the said H. T. the one sixth part of one third thereof, and the said E. W. T., M. M. C., J. M. T., and S. M. T. each five seventy-second parts thereof; and that the parties entitled to such costs have execution according to the course and practice of this court; that is to say, that the parties whose several taxed bills of costs and expenses exceed the amount of their respective portions of the costs as aforesaid, have execution for such excess against the other parties respectively, for the amount which the respective taxed bills of such other parties are less than the amount of their respective portions of the whole costs of all the parties. And the costs of the guardian ad litem of the infant defendants respectively, to the extent of their several shares or portions of the whole costs of the suit, are declared to be liens upon their respective shares of the premises in favor of such guardian ad litem; which costs the general guardians of the infants are authorized and directed to pay out of the rents and profits of such shares, or out of any other moneys which may come to their hands belonging to the

said infants respectively. And that the guardian ad litem be at liberty to apply to the court for further directions if necessary, as to the payment of such costs.

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No. 522.

*Another final decree for partition.*

At, etc. [*as in No. 255.*]

[*Title of cause.*]

This cause coming on to be heard upon the report of H. W., B. R. and J. M., commissioners heretofore appointed by the decretal order of this court, dated the — day of —, in the year of our Lord one thousand eight hundred and —, and for final direction, by which report it appears that the said commissioners having been first duly sworn honestly and impartially to execute the trust reposed in them, and to make partition as directed by this court, had proceeded, in virtue of the power conferred on them by the said decretal order, to make partition of the whole of the said premises, lands, tenements and hereditaments in the pleadings in the cause, and in the decretal order [\*VOL. II, 740] \*mentioned and described, between the said defendant T. J. M. and the said complainants, and the infant defendants E. W. B. and S. B., according to their respective rights and interests therein, so that one part and the appurtenances thereof, be assigned to the said defendant T. J. M., and one other part or moiety thereof, with the appurtenances be assigned to the said complainants, and the infant defendants E. W. B. and S. B., as established and directed in and by the said decree; by which report it satisfactorily appears that the said commissioners have made the partition of the said premises, which in and by the said decree heretofore made in the above entitled cause they are authorized and required to make; and that they have allotted and set apart to the said defendant T. J. M., one part of the said premises, by metes and bounds, as follows: that is to say, the allotment which the said commissioners have designated on the map made by the surveyor, employed by the said commissioners for that purpose, and signed by the said commissioners as division No. 1, which contains forty-seven acres, and is bounded and may be described as follows: that is to say, [*insert description of land;*]

together with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertaining.

And the said commissioners have allotted and set apart to the said complainants A. V. and M. his wife, H. V., E. W. B. and S. B., the other remaining part of the said premises, which is distinguished on the said map made by the surveyor employed by the said commissioners respectively as division No. 2, which contains thirty acres, and may be bounded and described as follows: [*insert description of land,*] together with all and singular the hereditaments and appurtenances thereto belonging.

By which said report the said commissioners do further certify and report, that in making the said partition, as the same could not otherwise be made equal between the parties without prejudice to their rights and interests, they, for the purpose of equalizing the same, being thereunto authorized, did ascertain the compensation and sums to be made and paid the parties respectively to whom compensation ought to be made in regard to the difference of the value of the several parts or allotments into which the said premises were so divided as aforesaid, for equality of partition, according to the nature and equity of the case; and did allot, direct, and award the same to be paid as follows: that is to say, they did ascertain the compensation which ought to be made by T. J. M., the party to whom the said allotment division No. 1 of the said premises was so allotted as aforesaid for equality of partition in the premises to be the sum of — dollars, lawful money; and they [*\*VOL. II, 741*] did \*allot and award the said sum of — dollars to be paid by the said T. J. M. to the said complainants and the said —, to whom the said allotment, division No. 2, of the said premises, was allotted as aforesaid in full of the compensation to be made in the premises to that share of the said premises.

And the said commissioners did further certify and declare the hereinbefore described part or allotment of the said premises distinguished as division No. 1, allotted and assigned to the said T. J. M. as aforesaid, and the compensation by them directed to be made and paid for the same, to wit: the sum of — dollars to the division No. 2, as aforesaid, as by them directed and awarded to be with the appurtenances relatively considered, the one equal third part of the whole of the said premises whereof they were authorized to make partition as aforesaid.

And they did further certify and report, that the said part or allotment of the said premises distinguished as division No. 2, allotted

and assigned to the said complainants, and the said E. W. B. and S. B. as aforesaid, and the said compensation of ——— dollars by them awarded and declared to be made to the same for equality of partition, being added thereto and paid and taken therewith to be, quality and quantity relatively considered, the one equal third part of the whole of the said premises whereof they were authorized to make partition as aforesaid.

Now on reading and filing notice of hearing upon the said report, together with proof of service thereof on the solicitor of the defendant T. J. M., and upon the solicitor of the guardian ad litem of the infant defendants E. W. B. and S. B., on motion of P. G. E., counsel for the complainant, after hearing W. A. B., counsel for the defendant T. J. M., and W. L., counsel for the guardian ad litem of the infant defendants E. W. B. and S. B., it is ordered, adjudged and decreed, that the said report be, and the same hereby is, in all things, confirmed.

And it is hereupon ordered, adjudged and decreed, that the said partition so made by the aforementioned commissioners of all the said lands, tenements, hereditaments and premises, be firm and effectual forever.

And it is further ordered, adjudged and decreed, that the said hereinbefore described part or allotment of the said premises, distinguished as aforesaid in the said report, as division No. 1, allotted and assigned as aforesaid by the said commissioners to T. J. M., as one part (or moiety) of the said premises, constituting his share of the said lands and tenements with the appurtenances, shall be, and the same is hereby vested in him the said T. J. M., in severalty to be had, held and enjoyed by the said T. J. M., his heirs and assigns forever.

\*And that the hereinbefore described part or allot- [\*VOL. II, 742] ment of the said premises, distinguished as aforesaid in the said report, as division No. 2, allotted and assigned as aforesaid by the said commissioners to the said complainants and the said defendants E. W. B. and S. B., as one part (or moiety) of the said premises, constituting their share of the said lands and tenements with the appurtenances, shall be, and the same is hereby vested in them the said complainants A. V. and wife, H. V. and wife, and the said defendants E. W. B. and S. B., in severalty to be had, held and enjoyed by them, their heirs and assigns forever, separate and apart from the other part or moiety of the said premises.

And it is further ordered, adjudged and decreed, that the said

compensation of — dollars, by the said commissioners ascertained, allotted and awarded to be made by the said T. J. M., to whom the said part or allotment, division No. 1, of the said premises was allotted and assigned as aforesaid, be paid by the said T. J. M. to the said complainants and E. W. and S. B., to whom the aforesaid allotment or division No. 2 was allotted and assigned as aforesaid, in full of the compensation to be made to them in the premises aforesaid; the amount of which compensation is hereby declared to be a specific lien upon said division No. 1, and entitled to a preference in payment.

And it is further ordered, adjudged and decreed, that the costs of the complainant and the defendants be taxed as between party and party, and apportioned between the complainants and the defendants T. J. M. and E. W. B. and S. B., by the taxing officer, according to their respective interests in the premises, and that either and each of the several parties, whose bill of costs and expenses as taxed exceeds the amount of his share of the whole costs and expenses, have execution against the other or others for the balance thus due as ascertained and settled by the taxing officer.

## CHAPTER X.

## COMMISSION TO TAKE PROOF OF FOREIGN WILLS.

No. 523.

*Petition for commission.*

See ante, p. 315.

IN CHANCERY.

Before the Chancellor.

In the matter of proving the will of J. S., deceased.
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To the Chancellor of the State of New York.

\*The petition of P. G. S. and C. F. S., of, etc., re- [\*Vol. II, 743] respectfully sheweth.

That J. S. late of Charleston, in the state of South Carolina, was at the time of his decease, a citizen of the state of South Carolina, and domiciled at Charleston aforesaid; and that he departed this life on or about the — day of —, having previously made his last will and testament in due form of law, to pass his personal property according to the laws of South Carolina, which has been duly proved and recorded at Charleston aforesaid, according to the laws of the state of South Carolina, and a copy thereof is hereunto annexed; by which said last will and testament, he constituted and appointed your petitioners, together with E. S. his widow, the sole executors thereof.

That said will was duly proven before T. L., Esq., ordinary for Charleston district, on the — day of —, and recorded in the office of the court of probate in said Charleston, denominated the ordinary's office for said Charleston district. And that the original will is also deposited in the office of said ordinary, pursuant to the laws of the state of South Carolina, and cannot be withdrawn therefrom; the

laws of said State prohibiting the withdrawal of a will which has been duly admitted to probate, and only authorizing copies to be taken.

And your petitioners further show unto your honor, that the names of the persons who would have been entitled to the property of the said J. S. in case he had died intestate, and of his heirs-at-law, are, and were at the time of his decease, E. S. his widow, and three children, viz: [*insert their names and ages.*] All of whom reside at Charleston aforesaid.

And your petitioners further show unto your honor, that since the death of the said J. S., the said P. G. S., by virtue of a devise contained in the said will, has become seised of certain lots of land situate in the city of New York, which he now holds as such devisee.

And your petitioners further show unto your honor that the said J. S., at the time of his decease, was the holder of certain bonds and mortgages upon real estate situate within the city of New York, and other demands for considerable sums of money which are now due and unpaid; whereby the surrogate of the city of New York has jurisdiction to grant letters testamentary on the estate of the decedent.

And your petitioners further show unto your honor, that they are advised that the aforesaid will of J. S. deceased is a will duly executed according to the laws of the state of New York for passing real as well as personal estate, and that the subscribing witnesses to said will are H. W., S. R. and P. S., all resident without the jurisdiction of this state, to wit, Charleston aforesaid; and that the said will cannot be obtained from the said ordinary court to be proved in this state.

\*Your petitioners therefore pray that an order may [\*VOL. II, 744] be granted directing that said will be proved in this court as a will both of real and personal estate, upon a commission or *dedimus potestatem* to be issued for that purpose. And that such commission issue out of and under the seal of this court, to be directed to the said T. L., Esq. the aforesaid ordinary for Charleston district, and to B. H., Esq., of said Charleston, counsellor at law, authorizing them or either of them, to take proof of the due execution of the said will and of such other matters as may be necessary, by the testimony of such subscribing witnesses and such other witnesses as may be produced before them, upon written interrogatories to be annexed to said petition; and for such other or for such further relief in the premises as to your honor shall seem meet.

And your petitioners, etc.

[*Usual jurat.*]

## No. 524.

*Order for heirs-at-law, etc., to show cause why commission should not issue.*

See ante, p. 317.

At, etc. [as in No. 255.]

[*Title.*]

On reading and filing petition of P. G. S. and C. F. S., executors of the last will and testament of J. S., deceased, and praying that the last will and testament of the said J. S., therein mentioned may be proved in this court on a commission to be issued for that purpose, and on motion of Mr. H., of counsel for said petitioners, ordered that the heirs-at-law of the said J. S., and all other persons interested in contesting the validity of such will or the codicils thereto, show cause before the chancellor, at, etc., on the — day of —, next, why a commission should not issue out of and under the seal of this court directed to T. L., ordinary for Charleston district, in the state of South Carolina, and to B. H., of the same place, counsellor at law, authorizing and empowering them, or either of them, to take proof of the execution of the said will as a will of real and personal estate, and of the facts stated in such petition, by the testimony of the subscribing witnesses to said will, and such other witnesses as may be produced before them; to the end that such will may be recorded as a will of the real and personal estate of the testator. And it is further ordered that a copy of this order be published in the state paper once in each [\*VOL. II, 745] week, for — weeks previous to \*that time, and that a copy thereof be served upon such of the heirs-at-law and next of kin of the said J. S. as reside within this state, either personally, or in case of their absence, by leaving the same at their respective places of residence, at least — days before the time appointed for showing cause.

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 No. 525.

*Order for commission, where no previous notice of the issuing thereof has been given to the heirs or next of kin.*

At, etc. [as in No. 255.]

[*Title.*]

On reading and filing the petition of P. G. S. and C. F. S., executors of the last will and testament of J. S., deceased, and praying that



the last will and testament of the said J. S. therein mentioned, may be proved in this court upon a commission or *dedimus potestatem* to be issued for that purpose, and on motion of Mr. B., of counsel for said petitioners, ordered that a commission issue out of and under the seal of this court, according to the prayer of said petition, to be directed to T. L., Esq., ordinary for Charleston district, in the state of South Carolina, and to B. H., Esq., of the same place, counsellor at law, authorizing and empowering them, or either of them, to take proof of the execution of the said will as a will of real and personal estate, and of the facts stated in the petition, by the testimony of the subscribing witnesses to said will, and of such other witnesses as may be produced before them, upon written interrogatories to be settled by a master, and annexed to the said commission; and that previous to proceeding to take proof of said will, the said commissioners cause six days notice in writing of the time and place of executing said commission, to be served upon the widow and all the heirs-at-law and next of kin of the said J. S., residing in South Carolina, except the petitioners, [*or as the court shall have directed,*] that after the said commission has been executed, the said commissioners cause the same, together with the depositions taken thereon, to be sealed up and transmitted to the register of this court, at Albany, by mail—the petitioners, or their agent, paying the postage thereon. [*Where a previous order for the heirs and next of kin to show cause why a commission to prove the will should not be granted, has been made and served or published, the order for commission and as to the notice to the heirs and next of kin should be varied so as to conform to the special directions of the court.*]

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[\*VOL. II, 746]

\*No. 526.

*Commission.*

See ante, p. 316.

The People of the State of New York to T. L., Esq., ordinary for Charleston district, state of South Carolina, and B. H., Esq., of the same place, counsellor at law, greeting: Know ye that we, having full faith in your prudence and competency, have appointed you commissioners, and by these presents do authorize and empower you, or either of you, to take proof of the execution of

the last will and testament of J. S., deceased, a copy whereof is hereto annexed, and of such other matters as may be necessary, by the testimony of all or any of the subscribing witnesses thereto, and of such other persons as may be produced before you, upon the interrogatories hereto annexed. And after this commission shall have been executed, we authorize and empower you, or either of you, to certify the depositions of such witnesses taken hereon, and to seal up and transmit the same, together with this commission, to J. M. D., the register of this court at Albany, in accordance with the directions hereunto annexed.

Witness, [*as in No. 148.*]

D. P. H., Solicitor.

J. M. D., Register.

*Return to commission.*

The execution of the within commission appears by a certain schedule hereunto annexed.

Dated, etc.

T. L. }  
B. H. } Commissioners.

N. B. As the proceedings are all to be entered in the register's office, the commission must be returned to him, and not to the assistant register.

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No. 527.

*Interrogatories to be annexed to commission.*

See ante, p. 316.

Interrogatories to be administered to witnesses in pursuance of the commission annexed.

*First.*—What is your name, age, occupation and place of residence?

*Second.*—Were you acquainted with J. S., late of Charleston, in the [\*Vol. II, 747] \*state of South Carolina, and how long had you known him? Is he living or dead? And if deceased when or about what time, and where did he die, and had you personal knowledge of the fact of his death, or other and what means of knowing, or what information have you, or what is the general reputation upon that subject? Was the said J. S. at and immediately, and for how long a time before his decease, a citizen and resident of the said city of Charleston, or

where did he reside? Declare fully and particularly the facts according to your knowledge, information and belief, with the reasons for your belief.

*Third.* Look at the paper now produced by the ordinary for Charleston district, and herewith shown to you, purporting to be the last will and testament of the said J. S., and purporting to bear date on, etc., and purporting to be signed by the said J. S., and purporting to be witnessed by —; and look also at the exemplified and authenticated copy of the said original will, as certified by the said ordinary, and annexed to these interrogatories and answer. Did you or not see the said testator J. S. subscribe, seal, and duly execute the said original will, of which original the annexed is an authenticated copy; and did the said J. S. subscribe, seal, and publish, and declare the same to be his last will and testament in your presence, or did the said J. S. publish and acknowledge and declare the same to be his last will and testament in your presence and in the presence of the other subscribing or attesting witnesses, or either, or which of them? Did you, at that time, and in the presence and at the request of the said J. S., sign your name at the end of said will as an attesting witness? And did the other attesting witnesses, or either or which of them, subscribe and attest the same at the request of the said J. S., and in his presence, and did you all subscribe and attest the same in the presence of each other? Are you acquainted with the other subscribing and attesting witnesses to said will, and are they living, or dead; and if living, where do they reside; and if the said witnesses are absent, or for any cause are not produced, then answer why they are not present, and whether you are acquainted with the handwriting of said witnesses or either, or which of them? Have you seen them, or either, and which of them, write, or what means have you of knowing their handwriting; and is or not the signature of each of said attesting witnesses in his proper handwriting? Was the said J. S., at the time of the execution of his said will, of sound and disposing mind and memory, and in all respects competent to devise real estate, and not under restraint? Declare fully, according to your knowledge and belief.

*\*Fourth.* Are you the ordinary for the Charleston [\*VOL. II, 748] district in the state of South Carolina, or what is your official title and the proper name of your office, and how long have you held that office? Did you or not hold that office on the — day of — and ever since that time, or who was the ordinary on that day? Was or not the original will of the said J. S., now produced by you, bearing date —,

and purporting to have been executed on the — day of —, and purporting to be witnessed by —, duly proved before you as such ordinary, or before some other and what person, by the subscribing witnesses, according to the laws of the state of South Carolina, on the — day of —, or at some other and what time; and was the same recorded in the office of the court of probates in Charleston aforesaid, denominated the ordinary's office for said Charleston district, on the — day of — or at some other and what time? And was the said original will deposited in the office of said ordinary, pursuant to the laws of the state of South Carolina? Do the laws of said state prohibit the withdrawal of a will which has been duly admitted to probate therein? Is the said original will the same that has been produced and exhibited to the other witnesses already examined or in attendance as witnesses, to be examined under this commission?

*Fifth.* Is the paper hereunto annexed and herewith shown to you a true copy of the said original will, and is the same a true copy of the record of the said will and of the said proof thereof as the same appears of record in the office of the said ordinary? Is the seal affixed and appearing attached to the said exemplification your proper seal of office, or the official seal of the said court of probates, and is the signature thereunto annexed purporting to be signed by you, your own proper handwriting and signature? Is the same duly authenticated and exemplified according to the laws and statutes of the state of South Carolina?

*Sixth.* According to the laws and statutes of the said state of South Carolina is the said court of probates the proper and exclusive court having jurisdiction in such cases to receive and take proof of the execution of the last wills and testaments of persons dying at Charleston aforesaid; and had such court jurisdiction in this particular case, to receive proof of the execution of the will of the said J. S., or what is the law or custom of said state in this and similar cases; and is it the duty and office of the ordinary in said state to receive and file the original wills in such cases, and to record and preserve the same in his office? And is this will duly admitted to probate and recorded in the proper manner? And is the original will of the said J. S. retained by [\*VOL. II, 749] you in your \*office in pursuance of the laws and statutes of the state of South Carolina, and do you refuse to permit the same to be removed therefrom? Declare fully, according to your knowledge, information and belief, with the reasons for your belief.

*Lastly.* Do you know of any other matter or thing material or neces-

sary, as tending to prove the due execution of the last will and testament of J. S.; or touching or concerning the attestation by the witnesses; or touching and concerning the last place of residence and death of the said J. S.; or touching and concerning the laws of South Carolina in relation to the jurisdiction of the courts in matters of this nature; or relating to the general subject of inquiry which may be material? If so, state the same as fully and particularly as if specially interrogated.

D. P. H., Solicitor and of counsel for petitioner.

Allowed,

P. E., Master in chancery.

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No. 528.

*Order, on return of commission to take proof of a will of personal estate.*

See ante, p. 317.

At, etc.

[*Title.*]

Whereas, a commission was issued in this matter, tested the — day of —, directed to T. L., Esquire, ordinary for Charleston district, in the state of South Carolina, and to B. H., Esquire, counsellor at law of said Charleston, or either of them, authorizing them, or either of them, to examine H. W., S. R. and P. S., all of Charleston, in the state of South Carolina, as witnesses in the matter of the proving of the last will and testament of J. S., late of said Charleston, deceased, on oath, upon the interrogatories annexed to said commission, to take and certify the deposition of the witnesses and return the same according to the directions thereunto annexed. And the said commission having been returned duly executed, and the chancellor having duly considered the proofs taken under said commission, it is thereupon declared, adjudged and decreed, and the chancellor doth this day declare, adjudge and decree, that the will of the said J. S., a copy whereof is annexed to said commission, is duly proved as a will of real and personal estate within the state of New York. And [\*VOL. II, 750] it is further ordered, adjudged and decreed, that \*the said will of the said J. S., which is in the words and figures following, to wit: [*insert will,*] be, and the same is hereby established as a will of real and personal estate.

And it is further ordered, adjudged and decreed, that the said will, commission, order, instructions, interrogatories and proofs, be recorded in the office of the register of this court according to the form of the statute in such case made and provided, that this decree be transmitted to the surrogate of the city and county of New York to be recorded in his office, and said surrogate is hereby directed to issue letters testamentary or of administration with the said will annexed thereon, as upon wills proved before said surrogate.

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No. 529.

*The like as to a will of real estate.*

At, etc.

[*Title.*]

Whereas, upon the petition of C. S., a commission was issued in this matter, tested the — day of —, directed to N. P., authorizing and empowering him, among other things, to take the examination of all the subscribing witnesses to the last will and testament of W. S., late of, etc., deceased, as a will of real estate within the state of New York; and the said commission having been returned duly executed, and the chancellor having duly considered the proofs taken under said commission; it is thereupon declared, adjudged and decreed, and his honor doth this day declare, adjudge and decree, that the will of the said W. S., a duly authenticated copy whereof is annexed to the said •commission, is duly proved as a will of real estate, within the state of New York; and that it satisfactorily appears to the chancellor from the said proofs that the said will was executed in due form of law, according to the laws of this state, to pass real estate therein; that the original will is in the possession of the register of the court of probates for the county of —, in the state of —, from whence it cannot be removed; and that the authenticated copy of the said original will, annexed to the said commission, is a true copy thereof; it is further ordered, that such authenticated copy of the said will, together with the commission aforesaid, and the proofs and examinations taken under the same, be recorded in the office of the register of this court, according to the form of the statute in such case made and provided.



[\*VOL. II, 751]

\*BOOK VI.

COSTS.

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CHAPTER IV.

TAXATION AND RETAXATION.

No. 530.

*Notice of taxation of costs.*

See ante, p. 340.

[*Title of cause.*]

Sir:

Take notice that a bill of costs of which the above is a copy, will be taxed by J. W., vice-chancellor, [*or C. B., taxing master,*] of the fourth circuit, at his office, in the village of —, on the — day of — instant.

Dated, etc.

To W. H., Esq.,

Solicitor for defendant.

Yours, etc.

W. T. S., Solicitor for complainant

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No. 531.

*Affidavit annexed to bill of costs before taxation.*

See ante, p. 341.

[*Title of cause.*]

Saratoga county, ss. W. T. S., solicitor for the complainant, [*or defendant,*] in this cause, [*or the guardian ad litem of C. D., one of the*



*defendants in this cause ; or D. S., the clerk, or the law partner of W. T. S., the solicitor for the complainant in this cause,]* being duly sworn, says, that according to the best of his knowledge and belief, the several disbursements charged in the annexed bill of costs have been actually and necessarily paid, or incurred ; that the copies and exemplifications of documents charged therein were actually and necessarily used, or obtained for use ; that such bill of costs contains no charge for any draft, engrossment or copy of any pleading, or other proceeding, which has not been made, or for any other service which has not [\*VOL. II, 752] \*been performed, except such prospective services as are allowed by law, or by the practice of the court, to be taxed ; and that the number of folios contained in the draft, or in the copies of any pleading or proceeding are not overcharged in such bill. [*If the affidavit is to be made by the clerk, or the law partner of the solicitor, add :*] And this deponent further saith, that the annexed bill of costs has been made out by him from an examination of the drafts, or copies of the pleadings and proceedings in this cause, and of the entries in the register of the said solicitor ; and that such solicitor, by reason of his necessary absence from home, [*or by reason of his sickness,*] has not been able to make his own affidavit of the correctness of the charges in said bill of costs, to be annexed to the same before the taxation thereof.

Sworn this — day of —, }  
 1843, before me, A. K., }  
 Justice of the Peace.

W. T. S.

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No. 532.

*Bill of costs on the part of complainant, on a hearing of the cause upon pleadings and proofs.*

See ante, p. 340.

Retaining fees for solicitor and counsel .....	\$8 00
Drawing bill at 28 cents a folio .....	
Counsel perusing, amending and signing bill.....	2 50
Copy bill to preserve, (if made,) at 7 cents .....	
Engrossing bill to file, at 14 cents .....	

Commissioner taking oath to bill.....	\$0 12½
Abbreviating bill, exclusive of schedule, (if done,) at 3 cents..	
Attending master for injunction.....	0 50
Injunction master allowing injunction.....	1 25
Register filing bill and certificate.....	0 08
Drawing order for injunction, folio 1.....	0 28
Register entering order and sealing injunction.....	0 16
Solicitor attending register to enter order.....	0 50
Postage on letter to agent.....	
Postage on agent's answer.....	
Drawing injunction, folio 4, at 28 cents .....	1 12
Engrossing same at 14 cents .....	0 56
Copy to serve on defendant, at 7 cents.....	0 28
Serving injunction on defendant.....	0 75
[*VOL. II, 753] *Drawing affidavit of service, fol. 2.....	0 56
Engrossing affidavit, at 14 cents.....	0 28
Commissioner taking affidavit.....	0 12½
Drawing notice of lis pendens, fol. 2.....	0 56
Engrossed copy, to file with the county clerk.....	0 28
County clerk filing and entering in index.....	0 18½
Drawing subpœna, fol. 2, engrossing and seal.....	0 92
Copy of subpœna for defendant, at 7 cents.....	0 14
Serving subpœna on defendants, 75 cents each.....	
Drawing affidavit of service, fol. 2, and engrossing.....	0 84
Commissioner taking affidavit.....	0 12½
Postage on letter to sheriff.....	
Register filing subpœna and affidavit of service.....	0 08
Drawing order that defendant answer, fol. 1.....	0 28
Register entering order.....	0 08
Solicitor attending register to enter order.....	0 50
Notice of order for defendant and service.....	0 37½
Copy bill for defendant's solicitor, at 7 cents.....	
Drawing affidavit of serving bill and notice, fol. 2.....	0 56
Engrossing and taking affidavit.....	0 40½
Abbrev. ans. exclusive of sched. (if done) at 3 cents.....	
Drawing exceptions to answer, at 28 cents .....	
Counsel perusing, amending and signing same.....	2 50
Copy exceptions to keep, (if made,) at 7 cents.....	
Engrossed copy to file, at 14 cents.....	
Register filing exceptions.....	0 04

Copy exceptions for defendant, at 7 cents.....	
Drawing order to refer exceptions; fol. 1.....	\$0 28
Register entering order.....	0 08
Certified copy for master.....	0 06
Attending register to enter order of reference.....	0 50
Summons for defendant and service.....	0 37½
Master signing summons.....	0 12
Drawing affidavit of service, fol. 2 and copy.....	0 70
Commissioner taking affidavit.....	0 12½
Master attending and hearing exceptions ex parte.....	1 00
Solicitor attending on ex parte hearing.....	0 50
Counsel attending to argue exceptions.....	2 50
Master drawing report, fol. 2, at 20 cents.....	0 40
Copy report to file, at 10 cents, and filing.....	0 24
Copy for complainant's solicitor, at 6 cents.....	0 12
[*VOL. II, 754] *Notice to defendant that report is filed.....	0 37½
Drawing affidavit of notice, fol. 2, and engrossing.....	0 84
Commissioner taking, and register filing same.....	0 16½
Drawing order that defendant answer further, fol. 2.....	0 56
Register entering order.....	0 16
Attending register to enter order.....	0 50
Notice of order for defendant, and service.....	0 37½
Drawing affidavit of service, fol. 2.....	0 56
Engrossing affidavit, and oath.....	0 40½
Abbreviating further answer, (if done,) at 3 cents.....	
Drawing order to refer further answer, fol. 1.....	0 28
Register entering same.....	0 08
Certified copy for master.....	0 06
Summons and service, and master signing.....	0 49½
Drawing affidavit of service, fol. 2, and copy.....	0 70
Commissioner taking affidavit.....	0 12½
Exception master attending and adjourning.....	1 00
Solicitor attending master on adjournment.....	0 50
Master attending and hearing exceptions argued.....	3 00
Solicitor attending master on argument.....	1 00
Counsel arguing exceptions.....	2 50
Master drawing report, fol. 2, at 20 cents.....	0 40
Copy report to file, at 10 cents, and filing.....	0 24
Copy report for complainant, at 6 cents.....	0 12
Drawing exceptions to report, at 28 cents.....	

Counsel perusing and signing exceptions.....	\$2 50
Engrossing exceptions, at 14 cents.....	
Copy to keep, (if made,) at 7 cents.....	
Copy for defendant's solicitor, at 7 cents.....	
Notice of hearing of exceptions to report.....	0 37½
Drawing affidavit of service, fol. 2, and engrossing.....	0 84
Taking and filing affidavit.....	0 16½
Counsel arguing exceptions before the court.....	5 00
Solicitor attending on argument of exceptions.....	1 00
Copy pleadings, except., etc. for the court, at 7 cents.....	
Drawing order to overrule report, and for ans. fol. 2.....	0 56
Register entering order, and solicitor attending.....	0 66
Copy order for complainant's solicitor.....	0 12
Notice of order and service on defendant.....	0 37½
Drawing affidavit of service, fol. 2, and engrossing.....	0 84
Commissioner taking affidavit.....	0 12½
[*VOL. II, 755] *Abbreviating second further answer, (if done,) 3 cents.....	
Drawing replication, folio 2, and engrossing and filing.....	0 88
Copy to keep (if made).....	0 14
Copy replication for defendant and service.....	0 14
Drawing admission of service, folio 1, and engrossing.....	0 42
Drawing order to produce witnesses, folio 2.....	0 56
Register filing admission of service of replication.....	0 04
Register entering order to produce witnesses.....	0 16
Notice of order for defendant, and service.....	0 37½
Drawing admission of service, folio 1, and engrossing.....	0 42
Notice of list of witnesses intended to be examined.....	0 37½
Notice that documents will be read on hearing.....	0 37½
Notice of examination of witnesses.....	0 37½
Drawing sub. for witnesses, folio 3, and engrossing.....	1 26
Register sealing subpœna.....	0 08
Drawing subpœna ticket, folio 2.....	0 56
Copies of ticket, folio 2, at 7 cents, for each witness.....	
Serving subpœna on witness.....	0 12½
Drawing instructions for examining each witness.....	0 25
Do. for cross-examining defendant's witnesses.....	0 25
Solicitor attending examination, \$1 each day.....	
Examiner, taking deposition, at 20 cents a folio.....	
Engrossing depositions to be signed at 12 cents.....	

Copy depositions for complainant, at six cents.....	
Abbreviating depositions, (if done,) at 3 cents .....	
Examiner certifying one exhibit .....	\$0 25
Copy of defendant's exhibits, at 6 cents .....	
Register filing depositions and exhibits, 4 cents each.....	
Abbreviating exhibits, (if done,) at 3 cents.....	
A. B., a witness attending in county, 1 day.....	0 25
C. D., a foreign witness, attending 1 day .....	0 50
Same witness traveling 25 miles from his residence.....	1 00
Drawing affidavit of attendance of witnesses, folio 2.....	0 56
Copy affidavit and oath.....	0 26½
Filing affidavit of notice of order to produce witnesses.....	0 04
Drawing order to close proofs, folio 1, and entering.....	0 36
Attending register to enter order.....	0 50
Notice of hearing for defendant.....	0 37½
Drawing admission of service, folio 1, and engrossing.....	0 42
Notice of issue for register, and service .....	0 37½
Filing notice and entering cause on calendar.....	0 14
[*Vol. II, 756] *Drawing brief for hearing.....	2 00
Drawing case for the court, folio 5, and copy.....	1 75
Abbreviations of pleadings to annex, at 3 cents.....	
Copy pleadings for court, at 7 cents.....	
Copy complainant's depositions, at 7 cents.....	
Abbreviation of exhibits for court, at 3 cents.....	
Counsel arguing cause on hearing.....	8 00
Solicitor attending on hearing .....	5 00
Register reading and marking papers, 5 cents each.....	
Solicitor drawing decree, at 28 cents.....	
Counsel perusing and settling special decree.....	2 50
Copy for defendant's solicitor, at 7 cents .....	
Notice to defendant to attend register to settle decree.....	0 37½
Solicitor attending register to settle and enter decree.....	0 50
Register entering decree, at 8 cents.....	
Certified copy for complainant, at 6 cents .....	
Copy costs for defendant's solicitor .....	1 00
Notice of taxation of costs.....	0 37½
Bill of costs to be taxed and filed.....	1 00
Drawing affidavit to annex, folio 2 .....	0 56
Engrossing affidavit, and taking.....	0 40½
Vice-Chancellor taxing costs.....	1 50

Register filing taxed bill and affidavit .....	\$0 08
Register drawing enrolment, folio 5, at 15 cents.....	0 75
Engrossing same with decree, at ten cents.....	
Register signing and filing enrolled decree.....	0 69
Register docketing decree.....	0 10
Register for certificate of facts for county clerk to docket decree	0 14
Drawing fi. fa. at 28 cents.....	
Engrossing same, at 14 cents.....	
Register sealing fi. fa. and entering return and filing.....	0 12



# APPENDIX OF PRECEDENTS

UNDER THE EXISTING CONSTITUTION, JUDICIARY  
ACT AND CODE OF PROCEDURE

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## BOOK I.

PRECEDENTS OF PROCEEDINGS IN A CAUSE FROM ITS COM-  
MENCEMENT TO A DECREE.

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### CHAPTER I.

#### COMPLAINT.

##### No. 1.

*General form of complaint.*

SUPREME COURT—*County of* —.

A. B. [ <i>and others</i> ] plaintiffs, <i>against</i> C. D. [ <i>and others</i> ] defendants.
--

The above named plaintiff complains of the above named defend-  
ants, and alleges as follows :



APPENDIX OF PRECEDENTS.

That E. F., late of the town of —, in the county of —, now deceased, on, etc., etc.

The plaintiff further alleges [*on information and belief*] that, etc., etc.

Wherefore, the plaintiff demands judgment that, etc., etc. And that the plaintiff may have such other relief, or such further relief, in the premises as the nature of the case may require.

J. C., Plaintiff's attorney,  
Albany, N. Y.

When the plaintiff sues in person, the complaint is to be signed.

A. B., Plaintiff in person.

The confederating part, the charging part, the clause of jurisdiction and the interrogating part are no longer necessary.

When an *injunction* or a *receiver* are sought for, the following may be added to the prayer just before the prayer for general relief :

That in the meantime the defendant may be restrained by the order of the court, from —, etc.

And that a receiver of the said moneys, property and effects may be appointed, with the usual powers and duties. A *ne exeat* is to be prayed for in the same form.

The Code does not require a complaint to be *verified*, but if it is verified, the jurat is usually in this form :

STATE OF NEW YORK, }  
County of —. }

A B., being duly sworn, says, that he is — the plaintiff in this action; that the foregoing complaint is true of his own knowledge, except as to the matters which are therein stated on information and belief; and as to those matters he believes it to be true.

Sworn, etc.

When the complaint is verified by a person other than the plaintiff, the affidavit is to be varied according to the text.

APPENDIX OF PRECEDENTS.

No. 2.

*Affidavit annexed to complaint, to prevent dissolution of injunction.*

Vol. I., pp. 33, 35.

[*Title of cause.*]

STATE OF NEW YORK, }  
— county, } ss.

G. H., of — in said county, being duly sworn, deposes and saith, that he has read the complaint in this action [or, *has heard it read*] and knows the contents thereof; that he is familiar with all the material matters stated in said complaint, and has actual knowledge thereof; and that from such knowledge he knows that the matters of fact therein stated are true. And this deponent further saith, that he has no interest whatever in the event of this action. And further this deponent saith not.

G. H.

(Oath and jurat. See Vol. I, pp. 603, 604.)

CHAPTER II.

PROCESS FOR APPEARANCE.

No. 3.

*Summons—for relief—served with complaint.*

Vol. I., p. 48, and note 1.

SUPREME COURT, }  
County of ——. }

[*Title of cause.*]

To C. D., defendant: You are hereby summoned to answer the complaint of A. B., plaintiff, a copy of which is hereto annexed, and to serve a copy of your answer on me at my office in the village of S., within twenty days after the service of this summons, exclusive of the day of service; and if you fail to answer said complaint, as hereby required, the *plaintiff* will apply to the court for the relief demanded in the complaint.

J. C., Plaintiff's attorney.

Dated, ——.

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No. 4.

*Summons—for relief—complaint not served.*

SUPREME COURT, }  
County of ——. }

[*Title of cause.*]

To C. D., defendant: You are hereby summoned to answer the complaint of A. B., which will be filed in the office of the clerk of — county [or, if an order for publication has been allowed, *which was filed in the office of the clerk of — county, on the — day of —,*] and to serve a copy of your answer on me, at my office in the village of S.

APPENDIX OF PRECEDENTS.

within twenty days after the service of this summons, exclusive of the day of service; and if you fail to answer said complaint, as hereby required, the *plaintiff* will apply to the court for the relief demanded in the complaint.

J. C., Plaintiff's attorney.

Dated, —.

*Notice of the object of the action.*

(To be written immediately under the summons.)

To C. D., one of the defendants in the above entitled action:

Take notice that the object of the action entitled in the above summons, is to obtain a partition or the sale, if partition cannot be made, without prejudice to the interests of the owners, of certain real estate situated in the town of — in the county of —, described as follows [insert description and boundaries.] And that no personal claim is made against you.

J. C., Plaintiff's attorney.

Dated, etc.

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No. 5.

*Affidavit to obtain order for substituted service, in case of a resident defendant who cannot be found.*

See Vol. I., p. 52, and note 15.

[*Title of cause.*]

— county, ss. A. B. of —, etc., the plaintiff in the above entitled action the place of trial of which is in the county of — being duly sworn says that the action is brought for the partition of certain real estate situate in said county, owned in fee by the plaintiff and defendants as tenants in common; that C. D., one of the defendants, heretofore residing in the town of —, in said county, where his wife and family still reside, and which town was his last known place of residence, has departed therefrom to parts unknown, and the time of his return is uncertain, as deponent is informed by the wife of the said C. D. and verily believes; that said C. D. cannot be found within the said county of —, as appears by the return of the sheriff of — county, to the summons hereto annexed; nor can said defendant be found, in or out of this state, to the knowledge, information or belief of this deponent, after diligent inquiry of persons acquainted with said C. D.

A. B.

Sworn, etc.

## No. 6.

*Order for substituted service.*[*Title of cause.*]*(If the order be made by a judge out of court, no caption is necessary.)*

On the affidavit of A. B., with the summons and return of the sheriff of — county, thereto annexed, it appearing to me that C. D., the defendant, who resides in — county, cannot, after diligent and proper effort, be found [or, *that he avoids or evades personal service.*] I do order that service of the summons be made on the said C. D. by delivering to and leaving a copy thereof with the wife of the said C. D. at her residence in the town of —, in the said county of — [or, *by leaving a copy thereof with some person of proper age, at the residence of said C. D. in said town of —;*] or, if admittance cannot be gained, or any such proper person found who will receive the same, then by affixing such copy to the outer door of such residence; and by depositing another copy thereof, properly folded or enveloped, and directed to the said C. D. at his said place of residence in the town of —, in the post-office, and paying the postage thereon.

J. P., Justice of the Supreme Court.

Dated, etc.

*(Service of summons by publication—See Vol. I, p. 92, note 3; post, Book I, Chap. V.)*

## No. 7.

*Affidavit of personal service of summons, complaint, etc.(a)*

See Vol. I, p. 50, and note 5; id. 53, and note 18.

[*Title of cause.*]

County of —, E. F. of the city of T., in said county, being duly sworn, says, that on the — day of —, 187 , at said city, [or at the

(a) Rule 23 of the Supreme Court directs that where the service of the summons and complaint, etc., shall be made by any person other than the sheriff, the person making the service shall state, in his affidavit of service, *his age, or that he is more than twenty-one years of age; and when, and at what particular place, and in what manner, he served the same, and that he knew the person served to be the person mentioned and described in the summons as defendant therein; and also to state, in his affidavit, that he left with the defendant such copy, as well as delivered it to him*

Rule 24 directs that in actions for divorce, the affidavit, *in addition to the requirements of Rule 23, shall state what knowledge the affiant had of the person served being the defendant, and how he acquired such knowledge. And it directs that the court may require the affiant to appear in court, or before the referee, if a reference be ordered, and be examined in respect thereto.*

Those portions of the above rules which are in italics were introduced by amendments, in 1874.

APPENDIX OF PRECEDENTS.

town of —, in the county of —] he served the annexed summons, and notice of the object of the suit, [*together with the complaint therein mentioned, which is also hereunto annexed,*] on G. H. and J. K., two of the *defendants* in this action, by delivering a copy of the same to each of said *defendants* personally, and leaving the same with each. He further says, that he knew the *persons* served as aforesaid to be the *persons* mentioned and described in the said summons as *defendants* in this action. And this deponent further says, that he is — years [or, *more than 21 years*] of age. That such service was made upon the defendant G. H., at about ten o'clock in the forenoon, at his place of business, No. — River street, in said city, and upon the defendant J. K. at his residence, No. — street, in said city, at about seven o'clock, P. M., etc. E. F.

Sworn to, etc.

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No. 8.

*The like on an infant under the age of fourteen years.*

[*Title of cause.*]

Same as above, *if there be other defendants*, and add: And on the defendant N. O., who is an infant under the age of fourteen years, and personally known to this deponent, by delivering to and leaving with said infant, and also with J. O. his father, to defendant also personally known, with whom said infant resides, each, a copy of said summons, [*complaint*] and notice, at —, etc. [Or, if the infant has no father, mother, or guardian, add: *On T. W., to deponent also personally known, who is of full age, and with whom said infant resides, by delivering to, and leaving with him copies thereof, at —, etc.*]

Sworn, etc.

E. F.

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No. 9.

*The like on a corporation.*

[*Title of cause.*]

Same as in No. 7, then add: And that such service was made on the defendant, The First National Bank of Saratoga Springs, by

APPENDIX OF PRECEDENTS.

delivering to, and leaving with J. M. M. who is president thereof [or, *the cashier, or a director of said bank*] to the deponent personally known, a copy of said summons, [*complaint*] and notice, at the banking house of the said bank, in S. S.

Sworn, etc.

E. F.

---

No. 10.

*Affidavit of substituted service, under order made by a judge.*

[*Title of cause.*]

— county, ss. E. F. of —, in said county, being duly sworn, says, that he served the annexed summons on the defendant, C. D.,\* by delivering to, and leaving with M. D., the wife of said defendant, who is personally known to this deponent, a copy thereof, at her residence, in the town of —, in said county, [or, *on N. D. who is of full age and who was in charge of the premises where such service was made, to wit, the residence of said E. F.,*] pursuant to an order made in this action, directing such service.

Sworn, etc.

E. F.

---

No. 11.

*The like, where admission to house cannot be gained, and no person found on the premises.*

[*Title of cause.*]

[*Same as above, to the \*: then add, as follows:*] there being no person found in charge of the premises and dwelling house, wherein the said C. D. last resided, in the town of —, in said county, and such dwelling house being found closed and locked, the deponent, on the — day of —, affixed a copy of said summons to the outer door of said dwelling house, and, on the same day, deposited another copy of the same, properly folded and enveloped, in the post-office at —, directed to said defendant, at — R. county, New York, and paid the postage thereon.

Sworn, etc.

E. F.

APPENDIX OF PRECEDENTS.

No. 12.

*Affidavit of mailing summons and complaint.*

[*Title of cause.*]

— county, ss. J. E. of —, one of the attorneys for the plaintiff being duly sworn, says, that pursuant to the order of publication heretofore made in this action, he, on the — day of —, deposited in the post-office at S., a copy of the annexed summons and complaint, properly folded and enveloped, and directed to the defendant C. D. at —, Mass., with the postage thereon prepaid.

Sworn, etc.

E. F.

No. 13.

*Sheriff's certificates of service of summons and complaint.*

STATE OF NEW YORK, }  
County of —. } ss.

I certify that I served the summons and complaint hereto annexed upon the several defendants therein named, by delivering to and leaving with each of them, personally, copies thereof, at the times and at the places in said county set opposite their names, to wit:

.....on the.....day of.....187 at.....  
.....on the.....day of.....187 at.....  
.....on the.....day of.....187 at.....  
.....on the.....day of.....187 at.....  
.....on the.....day of.....187 at.....  
.....on the.....day of.....187 at.....

Fees, \$—.

— Sheriff.

By — Deputy.

STATE OF NEW YORK, }  
County of —. } ss.

I certify that on the — day of — 187, I served the summons and complaint hereto annexed, upon C. D. the defendant therein named, in the village of —, in said county, by delivering to and leaving with him personally — copies thereof.

Fees, \$—.

— Sheriff.

By — Deputy.



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STATE OF NEW YORK, }  
County of———. } ss.

I certify that on the —— day of —— 187 , I served the summons and complaint hereto annexed, upon C. D. and E. F. the defendants therein named, in the town of ——, in said county, by delivering to and leaving with each of them, personally, —— copies thereof.

Fees, \$——.

—— Sheriff.

By —— Deputy.

CHAPTER III.

APPEARANCE.

No. 14.

*Notice of appearance, and demand of a copy of the complaint.*

See Vol. I., p. 79.

[*Title of cause.*]

Sir: Please take notice that I am retained by and appear for C. D., defendant in the above cause, and demand a copy of the complaint herein, which may be served on me at my office, No. — River street, in the city of Troy, within the time required by law.

Dated the — day of —, 1875.

Yours, etc.,

A. P., Attorney for defendant.

To J. C., Esq., Attorney for plaintiff.

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No. 15.

*Petition by relative of an infant defendant for appointment of a guardian ad litem.*

See Vol. I., p. 83.

[*Title of cause.*]

To the Supreme Court of the State of New York.

The petition of E. D., the mother of C. D., an infant under the age of fourteen years, and with whom said infant resides, respectfully showeth, that the said C. D. was eleven years of age on the — day of — last; that an action has been commenced in this court against the said C. D. [*and others* ;] and that the summons therein was served on the said infant and your petitioner on the — day of —, and no

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guardian *ad litem* has been appointed for said infant [*and he has no general or testamentary guardian.*]

Wherefore your petitioner prays that H. M., of the village of —, an attorney and counsellor, [or, *the general guardian, if there be one,*] may be appointed guardian *ad litem* of said infant, to defend said action in his behalf.

C. D.

Add jurat, as given, Vol. I, p. 44, and consent of guardian, and affidavit of signature thereto, as in Vol. 2, p. 388.

CHAPTER IV.

PROCEEDINGS ON FAILURE TO ANSWER.

No. 16.

*Affidavit that no answer has been received on behalf of defendants.*

See Vol. I., p. 87, and note 1.

[*Title of cause.*]

STATE OF NEW YORK, }  
    \_\_\_\_\_ County. } ss.

J. C., attorney for the plaintiff, being duly sworn, says that more than twenty days have elapsed since service of the summons in the above entitled action, upon all the defendants, and of copy complaint upon the attorneys of such as have appeared therein, as appears by the sheriff's certificates, and other proof of service thereof; and that no demurrer or answer has been received on behalf of any of the defendants [*except that the defendant F. S., has put in an answer in which the rights and interests of the several parties as stated in the complaint are not contested or denied.*]

Sworn, etc.

J. C.

---

No. 17.

*Notice of application for the relief demanded in the complaint, etc.*

[*Title of cause.*]

Please take notice that upon the pleadings and proceedings in this action, and the usual proof of due service of the summons upon all of the defendants, and the affidavit with a copy of which you are herewith served, the plaintiff will apply, at the next special term of this court appointed to be held at the City Hall in the city of A., on the \_\_\_\_\_ day of \_\_\_\_\_ next, at the opening of the court on that day, for the relief demanded in the complaint, [*and for the usual order of reference under the 78th rule of this court.*]

J. C., Plaintiff's attorney.

CHAPTER V.

TAKING BILL AS CONFESSED.

No. 18.

*Order for publication as to absent, concealed or non-resident defendants.*

See Vol. I., p. 92, and note 3.

[*Title of cause.*]

It appearing to my satisfaction, by the affidavit of A. B. the above plaintiff, [or, *by the affidavit of A. B., and the sheriff's return to the summons thereto annexed,*] that G. H., one of the defendants in this action, has an interest in the subject matter of such action, as [*a tenant in common in the real estate sought to be partitioned therein;*] and that said G. H. is not a resident of this state, but resides at Peru, in the state of Illinois, [or, *that said G. H. cannot, after due diligence, be found, and the place of his present residence is not known, and cannot with reasonable diligence be ascertained,*] I do order that the summons in this action be served on the said defendant G. H., by publishing the same in the ———, a newspaper published in the village of ———, and in the ———, a newspaper published in the city of ———, once a week, for six weeks successively; and that a copy of the summons and complaint in this action, properly inclosed or enveloped, be forthwith deposited in the post office at ———, directed to said defendant G. H., at his place of residence, to wit, Peru, Illinois, and the postage prepaid thereon

Dated, etc.

J. P., Justice of Supreme Court.

## No. 19.

*The like, as to unknown owners, in a partition suit.*

[*Title of cause.*]

It appearing to my satisfaction, by the affidavit of A. B., the above named plaintiff, that this action is brought for the partition of certain real estate situate in the town of — and county of —, and that there are certain persons, to wit, the heirs-at-law of T. S., deceased, who have an interest as tenants in common, in the premises sought to be partitioned, whose names and places of residence are unknown, and cannot after due diligence, be ascertained, I do order that the summons in this action be served upon such unknown owners, by publishing the same once a week for six weeks successively, in the following newspapers hereby designated as most likely to give notice to such unknown owners, to wit: the State paper, the Albany —, a daily newspaper published in the city of Albany, and the New York —, a daily newspaper published in the city of New York.

Dated, etc.

J. P., Justice of Supreme Court.

## No. 20.

*Judgment on failure to answer summons personally served.*

See Vol. I., p. 96, and note 4.

At a special term of the Supreme Court held for the state of New York at the court house in the village of —, on the — day of  
1875—Present, Hon. J. P., Justice.

[*Title of cause.*]

This action having been commenced on the — day of —, 18—, by the personal service of the summons [*with a copy of the complaint*] on the defendant, [*or, defendants, naming them: and if service has been made on different defendants on different days, specifying the times of each,*] and due proof having been made and filed, of such service, and that no answer (or notice of appearance) has been received from the defendant, [*or, from either of the defendants,*] and on filing the clerk's

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report of the amount due, as assessed by him; [or, if the action is not on contract, and the damages sustained by the plaintiff by reason of the matters alleged in the complaint, having been assessed by a referee appointed by the court; or, by a jury under the direction of the court,] it is now, on motion of J. C., of counsel for the plaintiff, adjudged that, etc.

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No. 21.

*The like, on service of summons by publication.*

[Caption and title as in No. 20.]

The summons in this action having been ordered to be served by publication, and the time prescribed by the order for publication against the defendant [or defendants, naming them; and if the service was made on different defendants on different days, specify the date of each service] having expired on the — day of —, 187, [i.e. more than 20 days before the date of the caption,] and due proof having been made to the court of such service, and that no answer [or, notice of appearance] has been received from the defendant, [or defendants, naming them] and of the demand mentioned in the complaint, [and the plaintiff having filed as required, satisfactory security to abide the order of the court, touching the restitution, etc., as specified in subdivision 3 of section 246 of the Code,] it is now, on motion of J. C. of counsel for the plaintiff, adjudged that, etc.

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No. 22.

*Offer to allow judgment.*

See Vol. I., p. 98, and note 5; id. 315, and note 5.

[Title of cause.]

Please take notice that the defendant offers to allow judgment to be entered against him, in this action, for the sum of — dollars, with costs.

Dated,

A. P., Defendant's attorney.

... To J. C., Esq., Plaintiff's attorney.

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No. 23.

*Acceptance of offer of judgment.*

[*Title of cause.*]

Please take notice that the plaintiff accepts the defendant's offer of judgment, in this action, dated —, 187 .

J. C., Plaintiff's attorney.

To A. P., Esq., Defendant's attorney.

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No. 24.

*Affidavit to enter judgment thereon.*

[*Title of cause.*]

— county, ss. J. C., attorney for the plaintiff in this action being duly sworn, says, that the annexed offer to allow judgment, made by the defendant, was served upon him on the — day of — last; that within ten days thereafter, to wit, on the — day of — last, he served upon the defendant's attorney, at —, a notice that the plaintiff accepted the same, of which notice the foregoing is a copy.

Sworn, etc.

J. C.

---

No. 25.

*Judgment on offer.*

See Vol. I., p. 98, and note 5.

[*Caption.*]

[*Title of cause.*]

This action having been commenced by personal service of summons on the defendant C. D. on the — day of —, 187 , and the said defendant having appeared, and having offered, in writing, to allow the plaintiff to take judgment against him for — dollars, which offer the plaintiff, within — days thereafter duly accepted, in writing; now, on motion of — counsel for the plaintiff, it is *adjudged* that the plaintiff recover of the said defendant — dollars [or, *other relief, according to the offer,*] with — dollars, costs and disbursements; making, together — dollars.



APPENDIX OF PRECEDENTS.

No. 26.

*Offer to liquidate damages, conditionally.*

See Vol. I., p. 316, note 5.

[*Title of cause.*]

Sir:

Take notice that the defendant hereby offers that if he fail in his defence in this action, the plaintiff's damages be assessed at the sum of — dollars.

Dated, etc. [Signature of defendant or his attorney.]

To —, Plaintiff's attorney.

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No. 27.

*Notice of acceptance of offer.*

[*Title of cause.*]

Sir:

Take notice that the plaintiff hereby accepts the offer of the defendant that if he fail in his defence in this action, the damages of the plaintiff be assessed at the sum of — dollars.

Dated, —. A. P., Defendant's attorney.

To —, Defendant's attorney.

---

No. 28.

*Notice of motion to satisfy part of demand admitted.*

See Vol. I., p. 316; note 5.

[*Title of cause.*]

Sir:

Please take notice that, on the pleadings in this action the plaintiff will move this court at —, on the — day of —, that the defendant be required to satisfy so much of the plaintiff's claim as is admitted by the answer, to wit, the sum of — dollars [or, *otherwise, as the case may be;*] or for such other, etc.

Dated, etc.

J. C., Plaintiff's attorney.

To A. P., Defendant's attorney.

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No. 29.

*Order thereon.*

[*Caption as in No. 255.*]

[*Title of cause.*]

On reading and filing the complaint and answer in this action, and notice of this motion, and on motion of —, etc., *ordered*, that the defendant pay to the plaintiff the sum of — dollars [or, *otherwise*] admitted by him to be due; and also — dollars costs of motion; and that the plaintiff be at liberty to enter judgment, and have execution for the same, without prejudice to his right to proceed in the action, for the remainder of his claim; [or, *that if the same be not paid within — days after service of this order, an attachment issue against the defendant; and that the plaintiff proceed in the action, for the remainder of his claim.*]

CHAPTER VI.

THE DEFENCE TO A SUIT.

No. 30.

*Demand of copy of account.*

See Vol. I., p. 100, note 1.

[*Title of cause.*]

Sir:

I hereby demand that a copy of the account on which this action is brought [or, *mentioned in the complaint in this action*] be served upon me within ten days after this date.

Dated, etc.

A. P., Defendant's attorney.

To J. C., Esq., Plaintiff's attorney.

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No. 31.

*Notice of motion for a further account.(a)*

[*Title of cause.*]

Sir:

Take notice that on the pleadings and proceedings in this cause [and on the affidavit and papers herewith served] the defendant will move, at a special term of this court to be held [or, *before the Hon. J. P., a justice of this court, or, C. L., county judge of — county,*] at — on the — day of — next, at — o'clock in the — noon, for an order directing (\*) the plaintiff to serve a further account, in addition to the one already served; or that he be precluded from giving evidence of the account mentioned in the complaint; and for such other and further relief as may be just, with costs of motion.

Dated, etc.

A. P., Defendant's attorney.

To J. C., Esq., Plaintiff's attorney.

(a) When the account delivered is defective, the court, or a judge thereof, or a county judge, may order a further account. (Code, § 158.)

No. 32.

*Order for a further account.*

[*Caption.*]

[*Title of cause.*]

On reading and filing affidavit of — and a copy of the account heretofore furnished to the defendant by the plaintiff, and on motion of — of counsel for the defendant, after hearing — of counsel for the plaintiff, in opposition; *ordered*, that the plaintiff serve a further copy of his account, in addition to the one already served, (\*) upon the defendant's attorney within — days from the service of this order; specifying [*state particulars in which the account is desired to be amended,*] and pay — dollars, costs of motion, to the defendant; or that he be precluded from giving evidence of the account mentioned in the complaint.

---

No. 33.

*Order precluding evidence of an account.*

[*Title of cause.*]

On reading and filing affidavits, etc., and on motion of — of counsel for the defendant, and — of counsel for the plaintiff, in opposition; ordered that the plaintiff be precluded from giving in evidence, on the trial of this action, any matter pertaining to the account mentioned in his complaint herein; and that he pay \$ — costs of this motion.

---

No. 34.

*Motion to strike from a complaint irrelevant or redundant matter.*

See Vol. I., p. 101, note 2.

[*Title of cause.*]

Sir:

Take notice that on the pleadings in this cause [or, *other papers on which motion is founded,*] a motion will be made, at a special term of this court to be held at —, before Hon. —, a justice of this court,

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at chambers, on the — day of — next, at — o'clock in the — noon, for an order directing that all the matter contained in the 4th and 5th paragraphs [or, *folios*] of the complaint in this action be struck out, as irrelevant [or, *redundant*,] with costs, etc.

Dated, etc.

A. P., Defendant's attorney.

---

No. 35.

*Order directing irrelevant or redundant matter to be struck out.*

At a special term of the Supreme Court, held for the State of New York, at the city hall in the city of Albany, on the — day of — 187 , Present, Hon. T. M., Justice.

[*Title of cause.*]

On reading and filing notice of motion [or, *order to show cause, granted by this court on the — day of last,*] and the pleadings [or, *complaint*] and affidavits in support of, and in opposition thereto, and on motion of A. P., counsel for the defendant, and hearing J. C., counsel for the plaintiff in opposition; *ordered*, that (\*) the matter contained in the 4th and 5th paragraphs [or, *folios*] of the complaint in this action be stricken out as irrelevant [or, *redundant*,] with \$—— costs of motion.

A. P., Attorney.

J. W. H., Clerk.

---

No. 36.

*Notice of motion for an order directing a pleading to be made definite and certain.*

See Vol. I., p. 101, note 1.

[*Title of cause.*]

[As in No. 31 to (\*)] that the allegations of the 2d and 4th paragraphs [or, *folios*] of the complaint [or, *answer, etc.*] be made definite and certain, by amendment, by stating the time at which such alleged services were rendered, and the nature thereof [or, *otherwise, according*

to the circumstances,] and for such other and further relief as may be just, with costs of motion.

Dated, etc.

To J. C., Esq., Plaintiff's attorney.

A. P., Defendant's attorney.

---

No. 37.

*Order that a pleading be made definite and certain.*

[*Title of cause.*]

[As in No. 35 to the (\*)] the allegations of the 2d and 4th paragraphs [or, *folios*] of the complaint, [or, *answer*] be made definite and certain by amendment, by stating the time at which such alleged services were rendered, and the nature thereof, [or, *otherwise, according to the circumstances,*] with \$—— costs of motion.

---

No. 38.

*Order for an inspection, etc. of books and papers.*

See Vol. I., p. 101, note 3; id. 229, 316 (foot paging, 601,) note 5.

[*Caption.*]

[*Title of cause.*]

[As in No. 35 to (\*)] within —— days after service of this order, the [*plaintiff*] permit the [*defendant,*] his attorneys or agents, to inspect [*describe the books and papers*] at ——, for the space of —— days after giving the ——'s attorney notice of readiness to comply with this order; and that he also permit the —— to take copies thereof, or furnish him with the same. That in case the said —— shall fail to comply with this order, [*state the consequences,*] and that the —— be allowed —— dollars, costs of this motion.

No. 39.

*Affidavit to obtain a bill of particulars.*

See Vol. I., p. 101, note 4.

[*Title of cause.*]

— county, ss. C. D., the defendant above named, being duly sworn, says: 1. That this action is brought for [*state general object of the action.*] 2. That the complaint was served upon him on the — day of —, at —. 3. That this deponent does not know the items of the amount claimed from him in said complaint, [or, *state the ground of the application.*] 4. That the deponent cannot with safety answer the said complaint until he is furnished with the particulars of the plaintiff's demand. [If an extension of time is desired, add an affidavit of merits, as follows: that he has fully and fairly stated the case in this action, to A. P., his counsel therein, who resides at —; and that he has a good and substantial defence, on the merits in this cause, as he is advised by his said counsel and verily believes.]

Sworn, etc.

C. D.

No. 40.

*Alternative order for bill of particulars of the plaintiff's claim, or to show cause.*

[*Title of cause.*]

Let the plaintiff deliver to the defendant's attorney an account in writing, of the particulars of the demand for which this action is brought, [or, *the demand mentioned in folio — of the complaint*] by the — day of — next, [*usually four days after date,*] at — o'clock in the — noon, or show cause at that time, [*before me at chambers,*] in the town hall of the village of —, why he should not deliver such an account.

In the meantime, let all proceedings in the cause be stayed [and let the defendant have — days additional time to answer.]

J. P., Justice of Supreme Court.

No. 41.

*The like, as to the defendant's claim.*

[*Title of cause.*]

Let the defendant's attorney deliver to the plaintiff's attorney a bill of particulars of the counterclaim set up in the answer in this cause, by the — day of — instant, at — o'clock in the — noon, or show cause (before me) at that time, why, in default thereof, he should not be precluded from giving evidence of his said counterclaim at the trial. [And in the meantime let all proceedings in this cause, on the part of the defendant, be stayed; and let the plaintiff have — days additional time to reply.]

J. P., Justice Supreme Court.

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No. 42.

*Peremptory order for bill of particulars of the plaintiff's claim.*

[*Caption.*]

[*Title of cause.*]

Upon reading and filing the order to show cause herein, and the affidavit of —, and on motion of —, counsel for the defendant, opposed by —, counsel for the plaintiff; ordered that the plaintiff deliver to the defendant's attorney, a bill of particulars of the demand for which the action is brought; and that in the meantime all further proceedings in this action be stayed.

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No. 43.

*Peremptory order for a bill of particulars of the defendant's claim.*

[*Caption.*]

[*Title of cause.*]

Upon reading and filing affidavit of —, and on motion of —, counsel for the plaintiff, opposed by —, counsel for the defendant; ordered that the defendant deliver to the plaintiff's attorney, a bill of particulars of the counterclaim set up in the answer herein, within — days after service of this order; or, in default thereof, that he be precluded from giving evidence at the trial, in support of the same.



APPENDIX OF PRECEDENTS.

No. 44.

*Affidavit to obtain security for costs.*

See Vol. I., p. 102, note 5.

[*Title of cause.*]

— county, ss. C. D., the defendant in this action, being duly sworn, says, that the plaintiff herein does not reside within the jurisdiction of this court, but resides at —, in the state of —, and so resided at the commencement of said action, [or, *otherwise, according to the facts.*]

Sworn, etc.

C. D.

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No. 45.

*Order to file security or show cause.*

[*Title of cause.*]

On the annexed affidavit of C. D., let the plaintiff file security for costs in the sum of —, within twenty days after service of a copy of this order, or show cause at a special term to be held at the court house in —, on the — day of — next, why the same should not be ordered, with costs, and in the meantime let all proceedings on the part of the plaintiff be stayed.

Dated, etc.

[*Signature of Judge.*]

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No. 46.

*Order to file security for costs.*

[*Title of cause.*]

On reading and filing affidavit of C. D., and order to show cause, and on motion of A. P., counsel for the defendant, opposed by J. C., counsel for the plaintiff; ordered: 1. That the plaintiff file security for costs as required by the said order, and give due notice thereof to the defendant; 2. That all proceedings on the part of the plaintiff be stayed until such security and notice shall have been given, and until justification of the sureties, if they shall be excepted to; 3. That the defendant recover — costs of this motion.

APPENDIX OF PRECEDENTS.

No. 47.

*Bond for costs.*

Know all men by these presents, that I, G. B., of —, am held and firmly bound unto C. D., of —, in the sum of two hundred and fifty dollars, to be paid to him; for which payment I bind myself, my heirs, executors and administrators, firmly by these presents. Sealed with my seal, and dated this — day of —, 1875.

Whereas, A. B., who is not a resident of the state of New York, [or, *whatever the plaintiff's disability may be*] has commenced an action in the Supreme Court of New York against the said C. D.; now, therefore, the condition of this obligation is such that if the said A. B. shall pay to the said C. D., on demand, all costs that may be awarded to him in the said action; the above obligation is to be void; otherwise to remain in full force.

Sealed and delivered

in presence of C. P.

G. B.

[*To be acknowledged.*]

The plaintiff need not join in the bond. One surety is sufficient, unless more are required by the terms of the order. (2 Till. and S. Pr. 301.)

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No. 48.

*General form of demurrer to complaint.*

See Vol. I., p. 105, note 8.

[*Title of cause.*]

The defendant demurs [or, *the defendants E. F. and G. H., demur*] to the plaintiff's complaint, and for cause of demurrer, specifies that it appears upon the face thereof, that this court has not jurisdiction of the person of this defendant,

*or,*

that this court has no jurisdiction of the subject of this action;

*or,*

that the plaintiff has not legal capacity to sue, [*being an infant, and no guardian having been appointed for him;*]

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or,

that there is another action pending between the same parties, for the same cause of action ;

or,

that there is a defect of parties plaintiff [or, *defendant*,] in the omission of —, [*naming him* ;]

or,

that several causes of action have been improperly united therein, one being a cause of action for [*naming it*,] and another being a cause of action for [*so stating it as to show the incompatibility* ;]

or,

that the complaint does not state facts sufficient to constitute a cause of action.

A. P., Defendant's attorney.

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No. 49.

*Demurrer to some of the causes of action stated in the complaint.*

[*Title of cause.*]

The defendant demurs [or, *the defendants E. F. and G. H., demur*] to the first claim of the plaintiff's complaint, and for cause of demurrer specifies that the said complaint does not allege facts sufficient to constitute a cause of action, in that [the complaint shows that the copartnership, by its terms, has not yet expired, and no sufficient or legal cause for its dissolution is alleged.] And he demurs to the third claim of such complaint, on the ground, etc.

A. P., Defendant's attorney.

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No. 50.

*General form of answer.*

See Vol. I., p. 140, and notes.

[*Title of cause.*]

I. The said defendant, [or, *the defendant E. F.,*] in answer to the plaintiff's complaint in this action, alleges, admits and denies, as follows :

APPENDIX OF PRECEDENTS.

1st. As to the allegation in the said complaint, that [*insert allegation,*] this defendant admits the same to be true.

2d. As to each and every allegation in the said complaint contained, [*except that, etc.*] this defendant denies the same, and denies any knowledge or information thereof, sufficient to form a belief.

3d. As to the allegation therein, that [*insert allegation,*] this defendant denies the same, and every part thereof, and on the contrary thereof, alleges and states that, etc.

II. For new matter constituting a defence [or, *defences*, or, a *counterclaim,*] this defendant alleges: 1st, etc.

A. P., Defendant's attorney.

Add verification, when necessary; e.g. when the complaint is verified. See form of jurat to bill, Vol. I., p. 44.

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No. 51.

*Notice of motion for judgment on a frivolous answer.*

See Vol. I., p. 140, note 9.

[*Title of cause.*]

Sir:

Take notice that on the pleadings and proceedings in this cause, the plaintiff will move, at a special term of this court to be held, [or, before *Hon. J. P.*, a justice of this court, or, *C. L.*, county judge of — county,] on the — day of — next, at — o'clock in the — noon, for an order directing that judgment be entered for the plaintiff in this action on the answer herein, as frivolous; and for such other and further relief as may be just, with costs of motion.

Dated, etc.

To A. P., Defendant's attorney.

J. C., Plaintiff's attorney.

No. 52.

*Order for judgment on a frivolous answer.*

At a special term [*as in No. 28.*]

[*Title of cause.*]

On reading and filing notice of motion, and the pleadings in this cause, and on motion of [as in No. 35,] *ordered* that judgment be entered for the plaintiff, on the answer of the defendant, herein, as frivolous.

CHAPTER VII.

PROCEEDINGS ON THE PART OF THE PLAINTIFF PREVIOUS TO REPLYING.

No. 53.

*Order for an inspection by the plaintiff, of books and papers.*

See No. 38, and Vol. I., p. 101, note 3; id. p. 229, note 19.

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CHAPTER VIII.

PROCEEDINGS ON THE PART OF THE DEFENDANT PREVIOUS TO REPLICATION.

No. 54.

*Notice of motion to dismiss complaint.*

See Vol. I., p. 242, note 20.

[*Title of cause.*]

Sir :

Please take notice that on the annexed affidavit the defendant will move, at —, on —, that the complaint in this action be dismissed for neglect of the plaintiff to serve the same after demand made ; [or, *for neglect to serve the summons therein upon other defendants ; or, for neglect to proceed in the cause ;*] or for such other, etc.

Dated, etc.

A. P., Defendant's attorney.

To J. C., Plaintiff's attorney.

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No. 55.

*Affidavit for motion to dismiss complaint for failure to serve.*

[*Title of cause.*]

— county, ss. C. D. and A. P., being duly and severally sworn, each for himself says :

1. The said C. D. says that he was served with a summons in this action, on the — day of — last, and further says not.

2. The said A. P. says that he is the defendant's attorney, [or, *the principal clerk in the office of the defendant's attorney.*]

3. That on the — day of — last, he served on J. C., attorney for the plaintiff, by [*delivering the same to him personally or otherwise,*] a

demand in writing of a copy of the complaint in this action, signed by the defendant's attorney.

4. That no copy of said complaint has been served on the defendant's attorney.

Sworn, etc.

C. D.  
A. P.

---

No. 56.

*Order dismissing complaint for failure to serve.*

[Caption.]

[Title of cause.]

On reading and filing affidavit or —, etc. and on motion of —, counsel for the defendant; *ordered* that the complaint in this action be dismissed, with — dollars, costs of motion, to the said defendant (\*) [*unless the plaintiff, within — days after service of this order, serve his complaint upon the defendant's attorney, and pay the said costs.*]

---

No. 57.

*Affidavit for motion to dismiss complaint, for want of notice of trial.*

[Title of cause.]

— county, ss. A. P., being duly sworn, says that he is the attorney for the defendant in this action; that issue was joined in this action on the — day of — last; that the action is triable in the county of —; that a circuit court [or, *special term*] was held at —, in said county, on the — day of —, at which the action (\*) might have been tried, and at which issues of a later date were tried in the regular order, on the calendar, that the plaintiff did not notice this action for trial at the said circuit [or *special term*.]

Sworn, etc.

A. P.  
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No. 58.

*Affidavit for motion to dismiss complaint for failure to try cause after notice.*

[As in No. 57 to (\*) then add:] was noticed for trial by the plaintiff and was on the calendar thereof; that the cause was called, but not tried at the said circuit court [or, *special term*,] and the court has now adjourned; that issues of a later date were tried, in the regular order of the calendar, at the said circuit [or, *special term*,] and this cause might have been so tried.

Sworn, etc.

A. P.

---

No. 59.

*Order dismissing complaint for failure to try cause.*

[As in No. 56 to the (\*), then add:] unless the plaintiff, within — days after service of a copy of this order, stipulates for trial at the next circuit, and pays the defendant's costs up to this time, within — days after taxation thereof.

---

No. 60.

*Stipulation to try at the next circuit.*

[*Title of cause.*]

It is hereby stipulated on the part of the plaintiff, that this action shall be brought to trial at the circuit court [or, *special term*,] appointed to be held at —, on the — day of — next.

Dated, —.

J. C., Plaintiff's attorney.

[To be indorsed with an offer, as follows:

Please take notice that the plaintiff tenders the within stipulation, and offers to pay the defendant's costs up to this time.

Dated, —.

J. C., Plaintiff's attorney.

To A. P., Defendant's attorney.]

## No. 61.

*Order dismissing complaint absolutely.*

[As in No. 56 to (\*), then:] as against the defendant [E. F.] with costs in favor of the said defendant; but without prejudice to a new action by the said plaintiff and —, [naming new plaintiffs, if any,] against the said defendants [and others, if any, naming them,] and that a judgment be entered accordingly; and that the plaintiff pay to said defendant — dollars, costs of this motion.

CHAPTER IX.

REPLICATION (REPLY.)

See Vol. I., p. 249, and note 1.

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No. 62.

*General form of reply.*

[*Title of cause.*]

The plaintiff replies to the counterclaim contained in the answer of the defendant, [or, *to the first counterclaim contained in the answer of the defendant,*] as follows :

I. That —

II. That —

J. C., Plaintiff's attorney.

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No. 63.

*Demurrer to reply.*

See Vol. I., p. 250, note 4.

[*Title of cause.*]

The defendant demurs to the plaintiff's reply, [or, *first reply*] in this action for insufficiency, and assigns the following cause of demurrer, viz. : that said [first] reply does not state facts sufficient to constitute a valid reply.

A. P., Defendant's attorney.

No. 64.

*Notice of application for judgment, on failure to reply.*

See Vol. I., p. 249, note 2.

[*Title of cause.*]

Sir :

Please take notice that on the pleadings in this cause and the annexed affidavit the defendant will apply to this court, at a special term thereof, to be held at —, on the — day of — next, at — o'clock in the forenoon, before the Hon. J. P., a justice thereof, for judgment, for want of a reply in this action; or for such other relief as may be just, with costs.

Dated, etc.

A. P., Defendant's attorney.

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No. 65.

*Affidavit of no reply served.*

[*Title of cause.*]

— county, ss. A. P., being duly sworn, says that he is the attorney for the defendant in this action; that the answer in this cause [*setting up a counterclaim*] was served on the plaintiff's attorney, on the — day of — last; and that no copy of any reply or demurrer thereto has been served on this deponent.

Sworn, etc.

A. P.

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No. 66.

*Order for judgment for want of reply.*

At a special term, etc.

[*Title of cause.*]

The defendants answer in this cause, [*setting up a counterclaim,*] having been duly served on the plaintiff more than twenty days since, and no reply or demurrer having been interposed by the plaintiff; ordered that judgment be entered herein in favor of the above named

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defendant, against the above named plaintiff, for the sum of — dollars, [or, *state other relief,*] besides the costs and disbursements of this action, together with ten dollars costs of this motion.

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No. 67.

*Judgment for want of reply.*

[*Caption.*]

[*Title of cause.*]

The defendant in this action having duly served his answer on the — day of —, 187—, setting up a counterclaim to the plaintiff's cause of action, and the plaintiff having failed to reply or demur thereto, now on motion of A. P., of counsel for the defendant, it is *adjudged* that said defendant recover of the plaintiff herein, the sum of — dollars, being the excess of his counterclaim over the plaintiff's claim, [or, *state other relief,*] besides the costs and disbursements of this action, together with ten dollars costs of this motion.

CHAPTER X.

TESTIMONY.

No. 68.

*Notice of examination of a party, as a witness unconditionally, before trial.*

See Vol. I., p. 255, note 1; Code, § 391.

Sir:

Please take notice that A. B. [the plaintiff, or, *G. H. one of the defendants,*] in this action, will be examined before Hon. J. P., a justice of this court [*or, C. L., county judge of — county,*] at — on the — day of — instant, at — o'clock in the — noon, as a witness on behalf of the —.

Dated —.

[*Signature.*]

[Address of opposite attorney.]

To be served on the attorney for all the adverse parties. And it is said to be advisable to serve it personally on the party sought to be examined, although this is not absolutely necessary; as his attendance may be enforced in another manner. (2 Till. & S. Pr. 411.) That is, by a *summons*, served upon him in the same manner as upon a witness examined conditionally. (*Ibid.*; *Garighe v. Losche*, 6 Ab. 284, note; S. C. 14 How. Pr. 451.) And the usual fees of a witness must be paid to him. (*Hewlett v. Brown*, 7 Ab. 74.)

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No. 69.

*Summons to a party to testify as a witness, before trial.*

To —. You are hereby summoned to attend before me at — on the — day of — etc., to be examined as a party, before trial,

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on behalf of the — in an action now pending in the — court, between A. B., plaintiff and C. D., defendant. And for a failure to attend you will be punished according to law.

Witness may hand this — day of — 187-

[*Judge's signature.*]

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No. 70.

See Vol. I., p. 270, and note 10; Vol. II., p. 145, and note 1.

*Affidavit on application for leave to examine a witness conditionally*  
(*de bene esse.*)

[*Title of cause.*]

— county ss. C. D. of — in said county, being duly sworn, says, that he is the [defendant] in this action; that the said action is brought to [foreclose a mortgage;] that the defence is that — etc.; that P. G. of — is a material and necessary witness for this deponent, in sustaining the defence in said action; that, as deponent has been informed and believes, the said P. G. is about to leave this state, for the state of —, and, as deponent is informed and believes, does not intend to return to this state in time for the trial of this action.

Sworn, etc.

C. D

---

No. 71.

*The like, in a different form.*

[*Title of cause.*]

— county ss: C. D. of — being duly sworn, says, that he is the [defendant] in this action, and has appeared therein [or, if the deponent is plaintiff, *that the defendant has been served with summons therein;*] that this action is brought for — [*state the nature of the relief,*] that the defence is [*state defence;*] that this deponent has fully and fairly stated the case in this action to — his counsel therein, who resides at —, and has fully and fairly disclosed to him the facts which the deponent expects to prove by the witness [or, *each and every of the witnesses*] hereinafter named; that the deponent is advised by

his said counsel, and verily believes, that [he has a good and substantial defence on the merits, in this cause, and that] the testimony of R. S. of — is material and necessary for him in the prosecution [or, *defence*,] of this action; and without his testimony deponent cannot safely go to trial. That the said R. S. is now in this state, but, as deponent is informed and believes, is about to leave this state for —.

Sworn, etc. C. D.

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No. 72.

*Order for examination of witness conditionally.*

[*Title of cause.*]

On the annexed affidavit of C. D., ordered that R. S. of — be examined as a witness, conditionally, before me at — on the — day of — at — o'clock in the — noon; and that the —'s attorney be notified to attend such examination.

Dated, etc.

[*Judge's signature.*]

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No. 73.

*Certificate indorsed on deposition taken before a judge.*

[*Title of cause.*]

I certify that, pursuant to an order granted by me on the — day of —, C. D., whose deposition is annexed, attended before me, with the counsel for the respective parties, at — on the — day of — instant; and that, after hearing counsel, I proceeded to take the deposition of the said C. D., who being duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined by the respective parties, and testified as set forth in the deposition annexed, which he subscribed in my presence, after the same had been carefully read to him.

Dated, etc.

[*Judge's signature.*]

The *deposition* should be similar in form to that of a deposition taken before an examiner, under the former practice. See vol. 2, p. 440, No. 142.



No. 74.

*Order to show cause why a referee should not be appointed to take the examination.*

[*Title of cause.*]

On the annexed affidavit, let the — show cause before me, at —, on —, why [*name of witness*] should not be examined as a witness, conditionally, before a referee to be appointed. And let this order be served on the —'s attorney, [*personally*] within — days from date.

Dated, etc.

[*Judge's signature.*]

If, on the return day of this order, no sufficient cause is shown, the judge must appoint a referee, by an order specifying the time and place of the examination; or directing that notice of the same be given. (2 Till. & S. Pr. 367.)

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No. 75.

*Notice of examination of witnesses before a referee.*

This should be similar in form to the notice of examination before an examiner. See Vol. 1, p. 277, and Vol. 2, p. 438, No. 137.

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No. 76.

*Affidavit to obtain order to take the testimony of a witness conditionally, and that it be perpetuated.*

See Vol. I., p. 277 and note 11; 2 R. S. 398; id. 5th ed. Vol. III., p. 681, § 46.

[*Title of cause, if any.*] (a)

— county, ss. C. D. of —, in said county being duly sworn, says: that he is the [defendant] in this action; [or, *that he expects to be a party to a suit about to be commenced by A. B. against him, and*

(a) The affidavit should be entitled in the court in which the action is brought, no matter before what judge the examination is had. (*Sheldon v. Wood*, 2 Bosw. 282.) But an error in this respect is immaterial, if the body of the affidavit refers to the proper court. (Ib.)

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others;] that the said A. B. [or, *the party expected to be adverse to the deponent resides within this state, and is of full age;*] that the testimony of E. F., who resides at — is material and necessary to this deponent, in the defence of said action; and deponent is desirous of having the same taken conditionally, and perpetuated.

Sworn, etc.

C. D.

---

No. 77.

*Order for examination of witness conditionally, etc.*

[*Title of cause.*]

On the annexed affidavit, *ordered*, that E. F. be examined before —, at —, on the — day of —, at — o'clock in the — noon, as a witness in this cause, conditionally, to the end that his testimony may be perpetuated.

Sworn, etc.

[*Judge's signature.*]

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No. 78.

*Affidavit on motion for a commission to examine a witness out of the state.*

See Vol. I., p. 298, and note 14.

[*Title of cause*]

— county, ss. A. B., being duly sworn, says, that he is the [plaintiff,] in this action [or, *if the affidavit is made by one who is not a party, state why the party does not make it.*] That the issue was joined in this action on the — day of —, [and, *if the cause is noticed for trial, state when, by whom, and for what circuit or term.*] That the deponent has fully and fairly stated the case in this cause to — his counsel therein, who resides at —, and has fully and fairly disclosed to him the facts which this deponent expects to prove by the witness [or, *each and every of the witnesses*] herein after named. That the deponent is advised by his said counsel, after such statement, and verily believes, that [*he has a good and substantial defence to the action,*

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*on the merits, and that*] E. F. is a material witness for him in the defence [or, *prosecution*] of this action. That the said E. F. does not reside in this state, but resides at —, in the state of —.

Sworn, etc.

A. B.

---

No. 79.

*Notice of motion for a commission.*

[*As in No. 31 to (\*), then,*] that a commission issue in this action, directed to —, of —, in the state of —, for the examination of E. F., of —, in said state, as a witness in this action, upon interrogatories to be annexed to such commission, in which the [plaintiff] may join; and that the trial of this action be stayed until the return of the said commission; or for such other order, etc.

Dated, etc.

A. P., Defendant's attorney.

To J. C., Esq., Plaintiff's attorney.

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No. 80.

*Order for a commission.*

At a special term [*as in No. 35.*]

[*Title of cause.*]

On reading and filing affidavit, and on motion of —, after hearing —, of counsel for the —, opposed; ordered: 1. That a commission issue in this cause directed to — of —, in the state of —, to examine upon oath, on interrogatories to be annexed to said commission, E. F., of —, as a witness in behalf of the —, in this action.

2. That the [plaintiff] be at liberty to join in the said commission.

3. That the trial of this action be stayed until the return of the said commission.

No. 81.

*Commission to examine witnesses out of the state.*

See Vol. I., p. 299, and note 15.

The People of the State of New York, to — of —.

Know ye, that we, with full faith in your prudence and [SEAL] competency, have appointed you commissioner, and by these presents do authorize you [or, *any one or more of you,*] to examine E. F. of — in your said state, as witness in a cause pending in the Supreme Court of the State of New York, between A. B., plaintiff, and C. D., defendant, on the part of the [defendant,] on oath, upon the interrogatories annexed to this commission, and to take and certify the depositions of the witness, and return the same, according to the directions hereunto annexed.

Witness, J. P., one of the justices of our said supreme court, the — day of —, 187—.

*Directions for executing the commission.*

(To be annexed to commission.)

“The persons to whom such commission shall be directed, or any one of them, unless otherwise expressly directed therein, shall execute the same as follows :

“1. They, or any one of them, shall publicly administer an oath to the witnesses named in the commission, that the answers given by such witnesses to the interrogatories proposed to them shall be the truth, the whole truth, and nothing but the truth.

“2. They shall cause the examination of each witness to be reduced to writing, and to be subscribed by him and certified by such of the commissioners as are present at the taking of the same.

“3. If any exhibits are produced and proved before them, they shall be annexed to the depositions to which they relate, and shall in like manner be subscribed by the witness proving the same, and shall be certified by the commissioners.

“4. The commissioners shall subscribe their names to each sheet of the depositions taken by them ; they shall annex all the depositions and exhibits to the commission, upon which their return shall be indorsed ; and they shall close them up under their seals, and shall address the same, when so closed, to the clerk of the court from which the commission issued, or to the clerk of the county in which the venue

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shall be laid, as shall have been directed on the commission, at his place of residence.

“5. If there is a direction on the commission to return the same by mail, they shall immediately deposit the packet, so directed, in the nearest post office.

“6. If there be a direction on the commission to return the same by an agent of the party who sued out the same, the packet so directed shall be delivered to such agent.”

The above is an extract from the Revised Statutes of the State of New York, 5th edition, vol. 3, page 676, relating to the taking of testimony out of the State.

*Instructions to commissioners.*

Annexed to the commission is an extract from the statutes of the state of New York, relative to the taking of testimony out of the state, which extract is directed by law to be annexed to the commission; but as it does not comprise everything necessary to be attended to by the commissioners, they are requested to observe the following more ample instructions.

I. All the commissioners named in the commission should have notice of the time and place of executing it; and if any of them do not act, let the fact that they were notified, or could not be notified, and the reasons for their not acting be stated.

II. The commission must be executed by ——, the commissioner named therein.

III. The acting commissioner will examine the witnesses separately, after publicly administering to them the following oath or affirmation:

“You do swear, that the answers which shall be given by you to the interrogatories proposed to you, shall be the truth, the whole truth, and nothing but the truth. So help you God.”

The oath shall be administered (except in cases hereinafter mentioned) by the witness laying his hand upon, and kissing the Gospels.

But if the witness shall desire it, he shall be permitted to swear in the following form: “You do swear in the presence of the ever-living God,” and while so swearing he may or he may not hold up his hand, in his discretion.

Or if the witness shall declare that he has conscientious scruples against taking an oath, or swearing in any form, he shall be permitted to make his affirmation in the following form: “You do solemnly, sin-

cerely and truly declare and affirm," omitting the words "so help you God.

IV. The general style or title of the depositions must be drawn up in the following manner :

"Depositions of witnesses, produced, sworn [or, *affirmed*] and examined, the — day of —, in the year one thousand eight hundred and —, at —, under and by virtue of a commission issued out of the supreme [or, *county court of — county,*] in a certain cause therein depending and at issue between A. B., plaintiff, and C. D., defendant, as follows :

A. B., of [insert his place of residence and occupation,] aged — years and upwards, being duly and publicly sworn [or, *affirmed*] pursuant to the directions hereto annexed, and examined on the part of the —, doth depose and say, as follows: First—To the first interrogatory he saith, etc. [Insert witness' answer.] Second—To the second interrogatory he saith, etc., and so on throughout.

If he cannot answer, let him say that he knoweth not.

V. If there be any cross-interrogatories, the witness will go on thus: First—To the first cross-interrogatory he saith, etc., and so on throughout.

VI. When the witness has finished his deposition, let him subscribe it, and the acting commissioner will certify as follows :

Examination taken, reduced to writing, and  
 by the witness subscribed and sworn to, }  
 this — day of —, 187—, before }  
 —, *Commissioner.*

VII. If any papers or exhibits are produced and proved, they must be annexed to the depositions in which they are referred to, and be subscribed by the witness, and be indorsed by the acting commissioners, in this manner :

"At the execution of a commission for the examination of witnesses, between A. B., plaintiff, and C. D., defendant, this paper in writing was produced, and shown to [insert witness' name] and by him deposed unto at the time of his examination, before  
 —, *Commissioners.*"

VIII. The acting commissioners will sign their names to each half sheet of the depositions and exhibits.

IX. If an interpreter is employed, one of the commissioners will administer to him the following oath, and certify thereto.

"You do solemnly swear, that you will truly and faithfully inter-

pret the oath and interrogatories to be administered to E. F., a witness now to be examined, out of the English language into the — language, and that you will truly and faithfully interpret the answers of the said E. F., thereto, out of the — into the English language.”

Let the depositions be subscribed by the interpreter as well as by witness, and certified by the acting commissioners, as follows:

Examination taken, reduced to writing, subscribed by }  
 the witness and by the sworn interpreter, and sworn }  
 to by the witness, this — day of — 187—, before }

—, *Commissioner.*

X. The commissioners will make return on the back of the commission by indorsement, thus:

“The execution of this commission appears in certain schedules hereunto annexed.

—, *Commissioners.*

XI. The depositions and exhibits (if any) must be annexed to the commission, and then the commission, the directions, the interrogatories, cross-interrogatories, depositions and exhibits, must be folded into a packet and bound with tape. The acting commissioners are to set their seals at the several meetings or crossings of the tape, indorse their names on the outside, and direct it thus:

“To — Esquire,

Clerk of the county of —, at —, N. Y.

XII. When the commission is thus executed, made up, and directed, it must be returned in the manner specified in the direction of the commission, if there be any.

XIII. If there be no direction on the commission specifying the manner in which it is to be returned, then it must either be delivered to the court by one of the acting commissioners personally, or else be forwarded by some person coming to this place, and who must be liable, on his arrival, to make oath before one of the judges or the clerk of the court:

“That he received the same from the hands of A. B., one of the commissioners, and that it had not been opened or altered since he so received it.”

XIV. In case of returning the commission by mail, it is to be deposited by one of the acting commissioners in the nearest post office, he making the following indorsement thereon:

“Deposited in the post office at —, }  
 this — day of —, 187—, by me. } .

—, *Commissioner.*

In case of returning the commission by a vessel, it is to be deposited by one of the acting commissioners in the letter bag of such vessel, he making upon the commission the following indorsement:

“Deposited in the letter bag of the — now lying }  
 at —, and bound for the port of New York, }  
 this — day of —, 187 , by me. —, Commissioner.”

The commissioners are requested to be very careful to observe the foregoing instructions, as the smallest variance may vitiate the execution of the commission.

If the commission be returned by an agent, let him be instructed to call, on his arrival at this place, upon —, who will direct him as to its delivery.

A. P., Defendant's attorney.

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No. 82.

*Interrogatories to be annexed to commission.*

See Vol. I., p. 299, note 16.

[*Title of cause.*]

Interrogatories to be administered to E. F., of —, a witness to be examined under the annexed commission, on behalf of the [defendant] in the above entitled action.

*First.*—What is your name, age, occupation and place of residence?

*Second.*—Do you know the parties above named, or any or either of them? If so, which of them, and how long have you known each or either of them?

*Third.*—

*Lastly.*—Do you know of anything concerning the matters in question that may tend to the benefit and advantage of the [defendant?]  
 If so, declare the same fully and at large, as if you had been particularly interrogated concerning the same.

A. P., Defendant's attorney.

(See 2 Till. & S. Pr. 391; 24 How. Pr. 236.)



APPENDIX OF PRECEDENTS.

No. 83.

*Return indorsed on commission.*

See Vol. I., p. 303, and note 27.

[*Title of cause.*]

To the Supreme Court of the State of New York.

The undersigned [*two of*] the commissioners appointed by your honorable court, to take the examination of E. F., a witness in this cause, [*the other commissioner having declined to act, or, being absent,*] respectfully report; that the said E. F. [*or, witnesses*] attended before us, and being [*severally*] sworn by us, [*or, M. N. a judge of the court of — we being prohibited by law from administering oaths,*] to tell the truth, the whole truth and nothing but the truth, was examined by us on the interrogatories herewith returned, in the presence of J. C., counsel for the plaintiff, and A. P., counsel for the defendant; that the answers of the said witness to the same are truly stated in the accompanying deposition signed by him; that neither of said counsel objected to any testimony offered, or any proceedings had before us, [*or, if any objections were raised, state them.*]

G. H., }  
J. K., } *Commissioners.*

---

No. 84.

*Affidavit of messenger, on returning commission.*

[*Title of cause.*]

— county, ss. O. P., being duly sworn, says, that he received the packet now delivered by him to —, the clerk of the county of —, from the hands of G. H., of —, who, as deponent is informed and believes, is named in the commission inclosed in the said packet. That said packet has not been opened or altered since this deponent so received it.

Sworn, etc.

O. P.

No. 85.

*Notice of motion to suppress deposition.*

See Vol. I., p. 316.

[As in No. 31 to (\*) then,] that the deposition of E. F., taken under a commission heretofore issued in this cause, be suppressed on the grounds [state the grounds, or add,] stated in the affidavit hereto annexed; and for such other, ect., [as in No. 24.]

---

No. 86.

*Order suppressing deposition.*

[As in No. 35 to (\*), then add] the deposition of E. F. taken under a commission issued in this action, on the — day of —, 18—, be suppressed, and be declared inadmissible as evidence in this cause; [with — dollars, costs of motion, to the —.]

---

No. 87.

*Subpœna for witness, at circuit.*

See Vol. I., p. 279.

The People of the State of New York, to E. F., G. H., and J. K.,  
greeting:

*Subpœna.*

We command you that, all business and excuses being laid aside, you and each of you appear and attend before the justices of the supreme court, or some or one of them, at a circuit court, to be held at the court house in Ballston Spa, in and for the county of Saratoga, on the — day of — next, at — o'clock in the — noon, to testify and give evidence in a certain cause now pending in the supreme court, then and there to be tried between A. B., plaintiff, and C. D. [and others] defendant on the part of the plaintiff; [or, defendant;] (\*) and for a failure to attend, you will be deemed guilty of a contempt

APPENDIX OF PRECEDENTS.

of court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit fifty dollars in addition thereto.

Witness, J. P., Esquire, one of our justices of our supreme court, the — day of —, one thousand eight hundred and seventy —.

J. W. H., Clerk.

J. C., [Plaintiff's] attorney.

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No. 88.

*Subpœna ticket, for attendance at circuit court.*

By virtue of a writ of subpœna, to you directed and herewith shown to you, you are commanded that, all business and excuses being laid aside, you be and appear in your proper person before the justices of the supreme court, or some one of them, at a [special term of the] circuit court, to be held in and for the county of Saratoga, at the court house in Ballston Spa, on the — day of — next, at — o'clock in the — noon, to testify all and singular what you may know, in a certain cause now pending in the supreme court, then and there to be tried between A. B., plaintiff and C. D., defendant, on the part of the plaintiff. And for a failure to attend, you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit fifty dollars in addition thereto.

Dated the — day of —, 187—.

By the court.

To E. F.

J. C., Plaintiff's attorney.

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No. 89.

*Subpœna ticket for a party.*

By virtue of a writ of subpœna, to you directed and herewith shown to you, you are commanded that, all business and excuses being laid aside, you be and appear in your proper person, before the justices of the supreme court, or some one of them, at a circuit court to be held in and for the county of Saratoga, at the court house in Ballston Spa, on

APPENDIX OF PRECEDENTS.

the — day of — next, at — o'clock in the forenoon, to be examined as a witness at the instance of A. B., in a certain cause now pending in the supreme court, then and there to be tried between you, C. D., defendant and the said A. B., plaintiff, on the part of the plaintiff. And for a failure to attend, you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit fifty dollars in addition thereto.

Dated the — day of —, 187—.

By the court.

To —, Attorney for —.

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No. 90.

*Subpœna, duces tecum, for the circuit.*

[As in No. 87 to (\*) then add:] and that you bring with you, and produce, at the time and place aforesaid, a certain — now in your custody, and all other deeds, evidences and writings, which you have in your custody or power, concerning the premises. And for a failure to attend, you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby to the parties aggrieved, and forfeit fifty dollars in addition thereto.

Witness, J. P., one of the justices of our supreme court, this — day of —, 187—.

J. W. H., Clerk.

J. C., Plaintiff's attorney.

---

No. 91.

*Subpœna for attendance before a referee.*

The People of the State of New York, to E. F., G. H., and J. K., greeting:

We command you that, all business and excuses being laid aside, you and each of you appear and attend before M. N., Esq., referee, duly appointed under an order of the supreme court, on the — day

APPENDIX OF PRECEDENTS.

of —, at — o'clock in the — noon, at —, to testify and give evidence (\*) in a certain cause now pending in the supreme court, then and there to be tried between A. B., plaintiff, and C. D., defendant on the part of the plaintiff; and for a failure to attend, you will be deemed guilty of contempt of court, and liable to pay all loss and damages sustained thereby, to the party aggrieved, and forfeit fifty dollars in addition thereto.

Witness, J. P., one of our justices of our supreme court, the — day of —, one thousand eight hundred and sixty —.

J. W. H., Clerk.

J. C., Plaintiff's attorney.

---

No. 92.

*Subpœna ticket, for attendance on a reference.*

By virtue of a writ of subpœna, to you directed and herewith shown, you are commanded, that all and singular business and excuses being laid aside, you be in your proper person, before M. N., Esq., a *referee* duly appointed under an order of the supreme court [or, *county court of — county*] on the — day of — next, at —, at — o'clock in the — noon of the same day, to testify all and singular what you may know, in a certain cause now depending undetermined in the supreme court [or, *county court of — county*] between A. B., plaintiff, and C. D., defendant on the part of the plaintiff. And for a failure to attend, you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby, to the party aggrieved, and forfeit fifty dollars in addition thereto.

Dated the — day of —, 187—.

To E. F.

J. C., Plaintiff's attorney.

CHAPTER XI.

HEARING (TRIAL.)

I. ISSUES OF FACT.

No. 93.

*Notice of trial, (issue of fact.)*

See Vol. I., p. 312, note 1; id. 317, note 6.

[*Title of cause.*]

Sir :

Please take notice that the above action will be brought to trial, and an inquest taken therein [or, *and a motion made to dismiss the complaint therein*] at a circuit court [or, *trial term*] appointed to be held in and for the county of —, at the court house in —, on the — day of — next, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Dated, —.

Yours, etc.

To —, Esq., Attorney for —.

— Attorney for —.

Due service of above notice of trial is admitted this — day of —, 187-.

—, Attorney.

—————

No. 94.

*Notice countermanding notice of trial.*

[*Title of cause.*]

Sir :

Take notice that the notice of trial for the — circuit, heretofore served upon you, by me, is countermanded.

Dated, etc.

J. C., Plaintiff's attorney.

To A. P., Esq., Defendant's attorney.

APPENDIX OF PRECEDENTS.

No. 95.

*Note of issue.*

See Vol. I., p. 313, note 2.

[*Title of cause.*]

Plaintiff's note of issue.

J. C., Plaintiff's attorney.

A. P., Defendant's attorney.

Issue of fact; triable by jury, [or, *by the court.*]

Joined, by service of the last pleading, —, 187—, [or, when the same attorney notices several causes for trial at the same term, the notes of issue may be in tabular form, as follows :

SUPREME COURT, ..... TERM, 187—.

*Notes of issue.*

PARTIES.	DATE OF ISSUE.	ATTORNEYS.

No. 95.

*General affidavit of merits.*

[*Title of cause.*]

— county, ss. C. D., the defendant above named, being duly sworn, says : that he has fully and fairly stated the case in this action to A. P., his counsel therein, who resides at —; that this deponent has a good and substantial defence on the merits, in this action, as he is advised by his said counsel, after such statement, made as aforesaid, and verily believes, [*that such defence is as follows :*]

Sworn, etc.

C. D.

APPENDIX OF PRECEDENTS.

(In some cases the court will require, as a condition of granting the favor asked, that the *nature* of his defence should be stated. (*Ellis v. Jones*, 6. How. Pr. 297.) In such a case, add the last clause, as above.)

---

No. 97.

*Affidavit on motion to put off trial*

[*Title of cause.*]

— county, ss. C. D., of —, being duly sworn, says : that he is the defendant in this action ; [*if the motion is made before the cause is reached on the calendar ;*] that issue was joined herein on the — day of —, and notice of trial served by the [*plaintiff*] for the present [circuit ;] that the deponent has fully and fairly stated to — Esq., his counsel herein, who resides at —, the case in this action, and the facts which he expects to prove by E. F., a witness for the deponent herein ; that deponent is advised by his said counsel, after such statement, and believes, that the said E. F. is a material witness, for deponent, and that without his testimony deponent cannot safely proceed to the trial of this action. [*State what has been done to procure the attendance of the witness, and the cause of his absence.*] That the said witness is not in attendance at this circuit ; that deponent believes and expects that he will be able to procure the attendance of the said E. F. at the next circuit court to be held in said county on the — day of — next.

Sworn, etc.

C. D.

---

No. 98.

*Order postponing trial.*

[*Title of cause.*]

On the annexed affidavit, let the trial of this action be put off until —, on payment to the plaintiff's attorney of — dollars costs [*this day.*]

Dated, —

[*Judge's signature.*]



No. 99.

*Notice requesting admission of documentary evidence.*

See Vol. I., p. 601 (foot-paging,) note 5.

[*Title of cause.*]

Sir :

Take notice that the undersigned proposes to adduce in evidence, upon the trial of this cause, the document [or, *the several documents*] hereto annexed, and exhibited to you ; and that you are requested to give an admission, in writing, of the genuineness of the same [*respectively,*] pursuant to § 388 of the Code.

[*Date and address.*]

[*Signature.*]

---

No. 100.

*Admission thereunder.*

[*Title of cause.*]

I hereby make the admission above requested [where part, only of several documents are admitted, add : *So far as relates to the bond annexed, and refuse to make any other admission.*] (a.)

Dated, —.

[*Signature.*]

---

No. 101.

*Stipulation admitting execution and genuineness of documents.*

[*Title of cause.*]

For the purposes of the trial of this action, the due execution by the above named defendant, and the genuineness of the annexed contract are hereby admitted ; and the same may be read in evidence upon the trial of said action, without further proof.

Dated, etc.

A. P., Defendant's attorney.

(a) If the admission is signed by a party not an attorney, it should be proved, or acknowledged. (2 Ab. Forms, 405.)

APPENDIX OF PRECEDENTS.

No. 102.

*Stipulation admitting facts.*

[*Title of cause.*]

It is hereby stipulated and agreed that the following facts are, and shall be, admitted by both parties, for the purposes of, and on, the trial of this action: [*State the facts.*]

Dated —.

[*Signatures.*]

---

No. 103.

*Notice to produce documents at the trial.*

[*Title of the cause.*]

Sir :

Take notice that you are hereby required to produce on the trial of this action a certain [*describe the document, or, if there be several, say, the following papers, etc.*] Also all other documents, letters, books, papers and writings whatsoever, in your possession or under your control, containing any entry, memorandum, or other matter in anywise relating to the matters in question in this action.

[*Date and address.*]

[*Signature.*]

---

No. 104.

*Notice of motion to compel a deposit in court of money or other property.*

See Vol. I., p. 316, note 5 ; Vol. II., p. 565, note 1.

[*Title of cause.*]

Sir :

Take notice that on the pleadings [*and examination of the defendant*] in this action, the plaintiff will move [*as in No. 31,*] that the defendant be required to (\*) deposit in court the sum of — dollars, [*or, the following property, viz :—*] the same being admitted to be due [*or, to belong*] to the plaintiff, and to be in the defendant's possession or under his control, and held by the defendant, as trustee for the plaintiff, and for such other, etc., [*as in No. 31*]

APPENDIX OF PRECEDENTS.

No. 105.

*Order thereon.*

[*Caption.*]

[*Title of cause.*]

On reading and filing notice of motion, and the answer [or, *examination*] of the defendant whereby he admits that the sum of — dollars or, *the following property viz., —*] is due [or, *belongs*] to the plaintiff, and is in the defendant's possession etc. : *Ordered* that the defendant pay [or *deliver*] to the clerk of this court [or *the plaintiff upon his giving security, as the court may direct*] within — days after service of this order, the sum of — dollars, [or, *the said property,*] subject to the further order of this court.

---

No. 106.

*Notice of motion for an order that defendant satisfy that part of a claim admitted to be just.*

See Vol. I., p. 316, note 5 ; Vol. II., p. 565, note 1.

[*Title of cause.*]

[*As in No. 104 to the (\*) ; then add :*] satisfy that part of the plaintiff's claim which is admitted by the said defendant to be just, viz. : [*specify nature and amount of claim admitted.*] And for such other order, etc.

---

No. 107.

*Order that defendant satisfy that part of claim admitted.*

At a special term, etc.

[*Title of cause.*]

On the pleadings in this action, whereby it appears that the defendant admits a portion of the plaintiff's claim to be just, viz. : that he is indebted to the plaintiff in the sum of — dollars, on account of [*specify the nature of the claim admitted*], [and on reading and filing proof of due service of notice of this motion] ; it is, on motion of — counsel for the plaintiff, after hearing — counsel for the defendant

APPENDIX OF PRECEDENTS.

[or, *no one appearing*] in opposition, *ordered* that the said defendant pay to the plaintiff, within — days after service of this order, — dollars, with interest from the — day of —, 18—, [*and — dollars costs of this motion*;] and that the plaintiff have leave to issue execution against the property [*and person*] of the defendant, for the same, if not so paid.

---

No. 108.

*Demand of defendant for a change of place of trial.* .

See Vol. I., p. 317, note 6.

[*Title of cause.*]

Sir :

Take notice that I hereby demand that the place of trial of this action be changed from the county of — to the proper county, viz. : the county of —.

Dated, etc.

A. P., Defendant's attorney.

To J. C., Plaintiff's attorney.

(To be served before the time for answering expires. 2 Ab. Forms 243.)

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No. 109.

*Affidavit for order to change place of trial to the proper county.*

[*Title of cause.*]

— county, ss. C. D., the defendant above named [or, *A. P., attorney for the defendant*] being duly sworn, says, that this action is brought to [*state object of suit*;] and the county of — is designated in the complaint as the place of trial; (\*) that this deponent resides in the town of —, and county of —, and resided there at the commencement of this action; that the plaintiff then resided and still resides in [the city and county of New York;] that the summons and complaint in this action were served on this defendant on the — day of —, 187—; that on the — day of —, 187—, and before

answering, this deponent caused the annexed demand in writing to be served on the attorney for the plaintiff, and that said attorney has not consented to change the place of trial. [*Add affidavit of merits, as in No. 34.*] That the ground for requiring the change of place of trial is that [*state reasons.*]

Sworn, etc.

[*Signature.*]

No. 110.

*Order to show cause, with stay of proceedings.*

[*Title of cause.*]

On the foregoing [or *annexed*] affidavit, and on the pleadings, and the demand mentioned in said affidavit, let the plaintiff show cause, at a special term of this court, to be held at —, on the — day of —, at — o'clock in the —noon, why the place of trial of this action should not be changed from the county of —, to the county of —; and why the defendant should not have the costs of this motion, and such other relief as may be just. And, until the determination of this motion, let all proceedings on the part of the plaintiff be stayed, and particularly the entry of judgment, etc.

No. 111.

*Notice of motion to change place of trial.*

[*Title of cause.*]

Sir :

Take notice that upon an affidavit of which a copy is herewith served on you, and upon the complaint in this action, and the demand to change the place of trial, heretofore served on you, I shall move the court, at a special term thereof to be held at —, on the — day of — next, at — o'clock in the —noon, that the place of trial in this action be changed from the county of — to the proper county, viz. : the county of —.

Dated, —.

A. P., Defendant's attorney.

To J. C., Plaintiff's attorney.

## No. 112.

*Affidavit for order to change place of trial, to secure an impartial trial.*

[As in No. 109 to (\*) then add:] that an impartial trial cannot be had in the county of —, the county designated in the complaint as the place of trial of this action, as this deponent verily believes; the grounds of which belief are as follows: [state the reasons.]

(Upon this affidavit an order to show cause with a stay of proceedings, as in No. 92, may be obtained.)

## No. 113.

*Affidavit to change place of trial, for convenience of witnesses.*

[Title of cause.]

— county, ss. C. D. the defendant above named, being duly sworn, says, that the summons and complaint in this action were served on this deponent, on the — day of —, and that issue was joined herein, by the service of this defendant's answer, [or, by the service of the plaintiff's reply] on the — day of — last. That this deponent has fully and fairly stated the case, to —, his counsel, who resides at —, and that he has a good and substantial defence, on the merits to the action, as he is advised by his said counsel, and verily believes to be true. That this deponent has fully and fairly stated to his said counsel the facts which he expects to prove by each and every one of the following witnesses, viz.: E. F., G. H. and J. K.; that each and every one of them are material and necessary witnesses for his defence on the trial of this cause, as he is advised by his said counsel, and verily believes; and that without the testimony of each and every one of the said witnesses this defendant cannot safely proceed to the trial of this cause, as he is also advised by his said counsel, and verily believes; and that each and every one of said witnesses resides in the county of —, viz.: E. F., in the town of —, G. H., in the town of —, and J. K., in the town of —, in said county. That the facts which he expects to prove by said witnesses are as follows: by E. F., the fact that —; by G. H., the fact that —; and by J. K., the fact that —, etc.

Sworn, etc.

C. D.

APPENDIX OF PRECEDENTS.

(Upon this affidavit an order to show cause, with a stay of proceedings, as in No. 92, and a final order changing place of trial may be obtained.)

---

No. 114.

*Affidavit of plaintiff, in opposition to motion to change place of trial.*

[*Title of cause.*]

— county, ss. A. B., the plaintiff above named, being duly sworn, says, that he has fully and fairly stated to —, his counsel in this cause, who resides at —, the facts which he expects to prove by each and every one of the following witnesses, viz.: E. F., of the town of —, G. H., of the city of —, and J. K., of the town of —; all of whom reside in the county of —; and that they are each and every one of them material and necessary witnesses for this plaintiff on the trial of this cause, as he is advised by his said counsel and verily believes; and that without the testimony of each and every one of said witnesses, this plaintiff cannot safely proceed to the trial of this cause, as he is also advised by his said counsel and verily believes. That the facts which this plaintiff expects to prove by the said witnesses, are as follows: [*state facts to be proved by each witness as in No. 113.*]

Sworn, etc.

A. B.

---

No. 115.

*Order revoking stay of proceedings.*

[*Title of cause.*]

The plaintiff in this cause having presented to, and filed with me an affidavit showing such facts as will entitle him to retain the venue in this action, I hereby revoke the order to stay proceedings granted by me, on the — day of —, 187—.

Dated —.

J. P., Justice of supreme court.

No. 116.

*Order changing place of trial.*

[*Caption as in No. 28.*]

[*Title of cause.*]

On reading and filing notice of motion, and the affidavit of —, counsel for the defendant, and after hearing —, counsel for the plaintiff in opposition; *ordered*, that the place of trial in this action be changed from the county of —, to the county of —; [*ten*] dollars costs of this motion, to abide the event of the action.

— Attorney.

J. W. H., Clerk.

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II. ISSUES OF LAW.

No. 117.

*Notice of trial.*

See Vol. I., p. 312; id. 620, (foot paging.)

[*Title of cause.*]

Sir:

Take notice that the issue [or *issues*] of law in this action will be brought to trial at a special term of this court [or *at a circuit court*] appointed to be held in and for the county of —, at —, on the — day of — next, at — o'clock in the forenoon, unless the same has been previously tried.

Dated —.

[*Address.*]

[*Signature.*]

---

No. 118.

*Note of issue.*

[*Title of cause.*]

Plaintiff's note of issue.

J. C., Plaintiff's attorney,

A. P., Defendant's attorney.

Issue of law joined —, 187—.



No. 119.

*Order sustaining demurrer.*

At a special term, etc. [*as in No. 35.*]

[*Title of cause.*]

This action having been brought to trial on the issue of law joined herein, after hearing J. C. in support of the demurrer, and A. P. [*or, no one appearing to oppose:*] *Ordered*, that said demurrer be (\*) sustained, and that the plaintiff [*or, defendant*] have judgment thereon, but with leave to the defendant [*or, plaintiff*] to amend the answer [*or, complaint, or, reply*] within twenty days, on payment of costs.

---

No. 120.

*Order overruling demurrer.*

[*As in No. 101 to (\*) then add:*] Overruled; and that the defendant [*or, plaintiff*] have judgment thereon, but with leave to the plaintiff [*or, defendant*] to withdraw his demurrer, and put in a reply [*or, answer,*] within twenty days, on payment of costs.

---

No. 121.

*Order sustaining demurrer in part, and overruling it in part.*

[*As in No. 119.*] *Ordered*, that said demurrer to the first cause of action set forth in the complaint be sustained; and that the defendant have judgment thereon; and that the demurrer to the second cause of action be overruled; and that the plaintiff have judgment thereon, but with leave to the plaintiff to serve an amended complaint within — days, and to the defendant to withdraw his demurrer to the second cause of action, and to answer the same.

APPENDIX OF PRECEDENTS.

No. 122.

*Affidavit for order of reference of all the issues in an action involving a long account.*

See Vol. I., p. 319; id. 623, (foot paging.)

[*Title of cause.*]

A. B., the plaintiff [or, *defendant*] in the above entitled action, being duly sworn, says: (\*) that said action is brought to [*state object of suit*]; that issue was joined on [or, *as of*] the — day of — last, by service of the defendant's answer, setting up [*state the defence*]; (†) that the trial of the aforesaid issue will require the examination of a long account on the part of the plaintiff [or, *defendant*, or, *both parties*,] consisting of at least — items of charges [*and credits*] of the said [*goods and services*] of various dates.

Sworn etc.

[*Signature.*]

---

No. 123.

*Affidavit to oppose motion, by denying account.*

[*As in No. 122 to (\*) then*] that the issue joined in this action will not require the examination of a long account, within the meaning of the statute. That this action is brought to recover the amount of a bill of goods sold by the plaintiff to the defendant; and that all of said goods were sold at one time, and as one transaction, and the credit claimed by the defendant is a payment made by him at that time, and then deducted from the amount claimed to be due from the defendant to the plaintiff; and that there are no other items of charge or credit involved in the issues herein.

Sworn etc.

[*Signature.*]

---

No. 124.

*Affidavit to oppose motion; where there are difficult questions of law.*

[*As in No. 122 to (†), then.*] that this deponent has fully and fairly stated the case, in this cause, to his counsel — who resides at —;

APPENDIX OF PRECEDENTS.

and that the investigation and trial of the issues of fact in this cause will, as deponent is advised by said counsel, after such statement, and believes, require the decision of difficult questions of law. That upon the issue joined in this action deponent is informed and believes it will be claimed and insisted by the plaintiff that [*state plaintiff's points of law;*] and that in answer thereto it will be claimed and insisted by the defendant's counsel that [*state defendant's points;*] which points, as deponent is advised by his said counsel, and believes, are material to the cause, and are difficult, especially in their application to the facts of this case.

Sworn, etc.

[*Signature.*]

---

No. 125.

*Notice of motion to refer cause.*

[*Title of cause.*]

Sir:

Take notice that on the pleadings [*and affidavits annexed*] the undersigned will move the court, at a special term thereof, to be held at — on the — day of — next, at — o'clock in the forenoon, or as soon thereafter as counsel can be heard, that all the issues of fact in this action be referred to — Esq., of —; [*or, to one or more referees*] to hear and decide the same; and for such other relief as may be just.

Dated —.

To J. C., Plaintiff's attorney.

[*Signature.*]

---

No. 126.

*Stipulation agreeing on nomination.*

[*Title of cause.*]

It is hereby stipulated and agreed by and between the parties to this action that in case the motion for a reference of all the issues therein be granted, the reference shall be to — Esq., of —.

Dated, etc.

[*Signatures.*]

No. 127.

*Order of reference of cause—on motion.*

[As in No. 35 to (\*), then:] it be referred to — Esq., of — to hear and decide the whole issues of fact in this cause.

---

No. 128.

*Order of reference of cause—without motion.*

At a circuit court held at the court house in the village of — in the county of — on the — day of — 187—.

Present—Hon. J. P., Justice.

[*Title of cause.*]

This cause coming on to be tried, and it appearing to the satisfaction of the court that it will require the examination of a long account; *Ordered*, that it be referred to — Esq., of — to hear and decide the whole issues of fact in this cause.

---

No. 129.

*Stipulation to refer cause.*

[*Title of cause.*]

It is hereby stipulated and agreed by the parties to this action that [*the right of trial by jury be waived, and that*] it be referred to — Esq., of —, counsellor at law, to hear and decide the whole issues in this cause, and that an order may be entered accordingly.

Dated —.

[*Signatures.*]

No. 130.

*Order thereon.*

[*At a special term, etc.*]

[*Title of cause.*]

On reading and filing the annexed consent, and on motion of ——— for the plaintiff [or *defendant* ;] *Ordered*, that it be referred to ——— Esq., of ——— counsellor at law, to hear and decide the whole issues of fact in this cause.

---

No. 131.

*Referee's appointment of first meeting.*

[*Title of cause.*]

The undersigned, referee herein, appoints the ——— day of ——— next at ——— o'clock in the ——— noon at the Town Hall [or, *office of* ———] in ——— for the trial of this action.

Dated, etc.

O. P., Referee.

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No. 132.

*Notice of hearing before referee.*

[*Title of cause.*]

Sir: Please take notice that the above cause will be brought to a hearing before O. P., Esq., referee, appointed therein, at the town hall [or, *his office*] in ——— on the ——— day of ——— 187—, at ——— o'clock in the ——— noon.

Dated the ——— day of ——— 187—.

Yours, etc.,

J. C., Plaintiff's attorney.

To A. P., Esq., Defendant's attorney.

Due service of above notice is hereby admitted the ——— day of ——— 187—.

A. P., Defendant's attorney.

No. 133.

*Oath of referee.*

[*Title of cause.*]

I, —, referee [or, *if there be several, we, J. K., L. M., and N. O., the referees*] appointed herein, hereby swear that I [or, *each, for ourselves, swear that we*] will faithfully and fairly hear and examine this action, and make a just and true report [*and findings*] therein, according to the best of my [or, *our*] understanding and ability.

Sworn, etc.

[*Signature.*]

No. 134.

*Account for submission to referee.*

[*Title of cause.*]

Account of the [*defendant C. D.*] of his receipts and disbursements from or on behalf of the personal estate of E. F., deceased [or, *on account of the copartnership of C. D. and company, or otherwise.*]

C. D.	Dr.		C. D.	Cr.
[ <i>Dates and amounts, with sources from which received.</i> ]			[ <i>Dates and amounts, with objects for which expended.</i> ]	

No. 135.

*Affidavit annexed to account.*

[*Title of cause.*]

— county, ss. C. D., being duly sworn, says: that he is the defendant named in the above account; that the same is correct, according to the best of his knowledge, information and belief, both as to its debits and credits; and that he does not know of any error or omission therein, to the prejudice of any party to this action.

Sworn, etc.

C. D.

No. 136.

*Report of referee—general form.*

See Vol. I., p. 548, and note 58 ; id. 632 (foot-paging.)

[*Title of cause.*]

To the Supreme Court of the State of New York.

The undersigned, appointed by this court, by an order dated the — day of —, 18—, a referee to hear and determine this action, and all the issues therein, having heard the proofs and allegations of the parties, and the arguments of their counsel, reports to the court as follows :

I. I find, as matters of fact :

1. That on, etc.
2. That, etc.

II. I find as conclusions of law :

1. That, etc.
2. That there is due to the plaintiff, from the defendant the sum of — dollars, with interest from the — day of —, 18—, being — dollars, amounting, in the whole, to — dollars ; for which sum the plaintiff is entitled to judgment in this action, against the said defendant, besides costs, [*or, where the defendant prevails ; that the defendant is not indebted to the plaintiff, as claimed in this action ; and that the defendant is entitled to judgment against said plaintiff, for his costs.*]

Dated, etc.

E. F., Referee.

No. 137.

*Exceptions to report of referee.*

(See Vol. I., p. 552, and note 64.)

[*Title of cause.*]

The plaintiff, [or, *defendant*] excepts to the report of E. F., Esq., referee herein, dated — :

I. For that the said referee reported that —, etc., whereas he ought to have found and reported that —, etc.

II. For that said referee reported that, etc., [*as above ; taking a separate exception for each separate objection.*]

J. C., Plaintiff's [or, defendant's] attorney.

No. 138.

*Exceptions to findings of the court or referee.*

[*Title of cause.*]

Sir :

Take notice that the plaintiff excepts to the first of the conclusions of law found by the Hon. —, justice [or, *E. F.*, the referee] herein.

That he also excepts to the second of the said conclusions of law.

That he also excepts to the third of said conclusions of law, in so far as it is thereby decided that, etc.

That he also excepts to said conclusions of law, generally, in that it is not decided that upon the facts proved, on the trial, the defendant is indebted to the plaintiff in the sum of — dollars.

Dated —.

J. C., Plaintiff's attorney.

To A. P., Defendant's attorney.

---

No. 139.

*Notice of motion for a further report.*

See Vol. I., p. 636 (foot-paging.)

[*Title of cause.*]

Sir :

Take notice that on [*the pleadings and*] the report of the referee in this case, dated —, the defendant [or, *plaintiff*] will move [*as in No. 24 to (\*) that (†)*] *E. F.*, the referee herein, make a further report, stating [*his findings of fact and conclusions of law separately ; or, that the — have leave to apply to E. F., the referee herein, for a further report, stating, etc.*]

[*Conclude as in No. 31.*]

---

No. 140.

*Notice of motion to set aside report of referee ; for a new trial, etc.*

See Vol. I., pp. 336, 337 (foot-paging.)

[*As in No. 139 to (†), then add :*] the said report of the referee be set aside, for irregularity in this ; that [*specifying the grounds ;*] and that



it be referred back to him to make a further or amended report, [or, and that a new trial be had, before the same referee, with costs, etc., to the —, to abide the event of the action; or, and that the order of reference to him, dated —, be set aside; and that a new trial be had; and that it be referred to —, Esq., of —, counsellor at law, to hear and determine the whole issues in this action, with costs, etc.]

[Conclude as in No. 31.]

---

No. 141.

*Judgment on report of referee—for plaintiff.*

See Vol. I., p. 638 (foot-paging.)

[Title of cause.]

This action having been referred to —, Esq., referee, to hear and determine the same, and his report having been filed, whereby he finds (\*) to be due from the defendant to the plaintiff the sum of — dollars; now, on motion of J. C., plaintiff's attorney; it is *adjudged* that the plaintiff do recover of the defendant the said sum, with — dollars, costs and disbursements; amounting in the whole to the sum of — dollars [or, if special relief is granted, state it.]

---

No. 142.

*Judgment on report of referee—for defendant.*

[As in No. 141 to (\*) then add:] for the defendant; now, on motion of A. P., attorney for said defendant, it is *adjudged* that the complaint herein be dismissed, on the merits of the action; and that the defendant recover of the plaintiff — dollars, costs.

---

No. 143.

*Order to show cause, on motion for a new trial, upon the judge's minutes.*

[Title of cause.]

Let the — show cause before me at the circuit court now in session, in and for the county of —, at the court house in —, on the —

day of — instant, why an application for a new trial in this action on the judge's minutes should not be entertained; and if said application is so entertained, then why such new trial should not be granted. And in the meantime, and until the determination of said motion, not exceeding twenty days, let all proceedings on the part of said — be stayed.

Dated, —.

J. P., Justice, etc.

---

No. 144.

*Order for time to prepare a case or exceptions, with stay of proceedings.*

At a special term, etc.

[*Title of cause.*]

On reading and filing the affidavit of —, and on motion of J. C., plaintiff's attorney; *ordered* that the — have — days from the date of this order, to make and serve a case or exceptions, and serve notice of a motion for a new trial herein; and that in the meantime and until the hearing and determination of such motion, if made, the entry of judgment herein be stayed.

---

No. 145.

*Case.*

[*Title of cause.*]

The issues in this action came on for trial before the Hon. —, one of the justices of this court, at a circuit court held at —, in and for the county of —, on the — day of —, 187—.

A jury was called and sworn, and the plaintiff, by his counsel, opened the case.

The plaintiff then, to maintain the issue on his part, called as a witness, on his part —, who testified as follows: [*give examination, in full.*]

Being cross-examined, the witness testified; [*give cross-examination, in full.*]

On a further direct examination, he testified, etc.

The plaintiff then called as a witness —, who testified [*as above.*]

APPENDIX OF PRECEDENTS.

The plaintiff then read in evidence, the following writing, marked Exhibit A., being a deed from —, to —, dated —, and recorded in the clerk's office of — county on the — day of —, 18—. The plaintiff then rested.

The defendant, then, by his counsel, opened the case to the jury; and to maintain the issues on his part, called as a witness —, who testified [*as above.*]

The cause was then summed up by the counsel for the parties, respectively, and submitted to the jury under the charge of the court.

The jury found a verdict in favor of the — for — [*state the verdict.*]

---

No. 146.

*Notice indorsed on case*

[*Title of cause.*]

Sir :

Take notice that the within is a copy of the case [or, *case containing exceptions*] proposed on behalf of the —, herein.

Dated, etc.

[*Signature.*]

To —, Esq., — attorney.

---

No. 147.

*Exceptions.*

[*Title of cause.*]

The issues in this action came on for trial before Hon. —, one of the justices of this court, at a circuit court [or, *special term of this court*] held at the court house in —, on the — day of —, 187—.

A jury was called and sworn, and the plaintiff, by his counsel opened the case.

The plaintiff, then, to maintain the issues on his part, offered in evidence, as an ancient deed, the following instrument: [*insert instrument.*]

The court held that the said instrument was not admissible as an ancient deed, and the plaintiff excepted.

The plaintiff thereupon called as a witness —, who testified that —, etc. On cross-examination he testified that —, etc.

The defendant objected that the failure to call the subscribing witness was not excused. The court overruled the objection, and the defendant excepted. The witness then proved the genuineness of the grantor's signature, and that of the subscribing witness; and thereupon the court allowed the deed to be read in evidence, and the defendant excepted.

The plaintiff asked the same witness —, etc. The defendant objected that this evidence was not admissible to vary the deed. The court sustained the objection, and the plaintiff excepted.

The defendant offered to show that the said deed was made for the purpose of —, etc. The offer was allowed, and the evidence admitted; and the plaintiff excepted.

The court directed the jury to find a verdict for the defendant, to which direction the plaintiff excepted.

[*Indorsement of notice as in No. 146.*]

---

No. 148.

*Case containing exceptions, upon a trial by jury.*

[*Title of cause.*]

The issues in this action came on for trial before the Hon. —, one of the justices of this court, at a circuit court, [or, *special term of this court,*] held at the —, in —, on the — day of —, 187—.

A jury was called and sworn, and the plaintiff, by his counsel opened the case to the jury.

The plaintiff, then, to maintain the issues on his part, called as a witness —, who testified [*insert testimony in full.*]

The plaintiff here rested, and the defendant moved for a nonsuit on the following grounds: 1st. That the plaintiff was not the real party in interest; 2d. That —, etc.

The court denied the motion, and the defendant excepted.

The defendant, to maintain the issues on his part then offered himself as a witness, and testified as follows: [*insert testimony.*]

The defendant then offered to show that on the — day of — last, the witness —, stated —, etc. The plaintiff objected that

this matter was merely collateral. The court held the objection well taken, and excluded the evidence, to which the defendant excepted.

The court charged the jury that [*state the substance of the whole charge, indicating exceptions taken to any portions, as follows:*] the testimony of the defendant as a party to the action, was liable to suspicion, from his interest in the result; to which the defendant excepted.

The court further charged that if they believed the statements of the witness —, the plaintiff was entitled to a verdict, to which the defendant excepted.

The court further charged that the measure of damages, in case the plaintiff was entitled to recover, was the profits —, etc., to which the defendant excepted.

The jury found a verdict for the plaintiff for — dollars.

[*Indorsement of notice, as in No. 146.*]

.No. 149.

*Case containing exceptions, on a trial by the court or a referee.*

[*Title of cause.*]

This action came on for trial before the court at a special term [or, *circuit court,*] held in and for the county of —, at the court house in —, [or before —, *the referee appointed by this court to hear and determine the same, at his office in the city of —,*] on the — day of —, 187—.

The plaintiff, by his counsel, having opened his case, read in evidence the promissory note mentioned in the pleadings, which was marked exhibit A., and is as follows: [*insert exhibit*] and then called as a witness — who testified [*insert testimony.*]

The defendant then called as a witness — who testified as follows: "I am the maker of the note, exhibit A. On the day the same matured, I handed to the plaintiff a new note."

The defendant then called on the plaintiff to produce this note, notice to produce it having been given. The plaintiff declined to produce it.

Q. State the contents of this new note?

This question was objected to by the plaintiff as immaterial and irrelevant. The object was overruled, and the plaintiff excepted.

A. The new note was made by me to the order of the plaintiff, was

dated on the day of the maturity of the previous note, and was payable ten days after date, for — dollars.

The witness further testified : The plaintiff agreed to withdraw the previous note from the bank, and wait for the money till the second note should become due.

Being cross-examined, he testified [*insert testimony.*]

The court [or *referee*] made and filed the following findings of fact and conclusions of law :

*Findings of fact.*

1. The defendant indorsed the note referred to in the pleadings.
2. At maturity the said note was duly protested, and notice duly given to the defendant.
3. The plaintiff, by agreement with the maker of said note, extended the time for payment by the maker, thirteen days, including grace.

*Conclusions of law.*

1. The defendant is liable to the plaintiff for the amount of said note, unless the plaintiff, by his dealings with the maker, has discharged the defendant as indorser.

2. The extension of time, given by the plaintiff to the maker, for the payment of the note, discharged the defendant, as indorser.

To these conclusions the plaintiff excepted.

Judgment was directed for defendant with costs.

---

No. 150.

*Amendments proposed to case, or exceptions, or case containing exceptions.*

[*Title of cause*]

Sir :

Take notice that the plaintiff proposes the following amendments to the case [or, *exceptions, or case containing exceptions*] proposed on behalf of the defendant.

1st. Amendment.

On the first page, 8th line, strike out the words — etc.

APPENDIX OF PRECEDENTS.

2d. Amendment.

On the — page, — line after the word “Rochester,” insert “where the defendant then resided.”

3d. Amendment.

On the — page, strike out the 10th, 11th and 12th lines, and substitute as follows: —.

Dated, —

To A. P. Esq., Defendants attorney.

[Signature.]

---

No. 151.

*Notice of settlement of case, exceptions, or case containing exceptions.*

[Title of cause.]

Sir:

Take notice that the proposed case [or, *exceptions*, or *case containing exceptions*,] together with the proposed amendments, will be presented to the Hon. — the judge, [or — *Esq.*, *the referee*,] before whom this cause was tried, at chambers, [or, at his office in —] on the — day of — next, at — o'clock in the — noon.

Dated —.

[Signature.]

[Address.]

---

No. 152.

*Notice of motion for a new trial.*

[Title of cause.]

Sir:

Take notice, that on the case [or, *exceptions*, or, *case containing exceptions*; or, *upon the affidavits of which copies are herewith served upon you*,] and upon all the pleadings and proceedings in this action, I shall move this court, at a special term thereof, to be held in and for the county of —, at the town hall in the village of —, on the — day of — next, at — o'clock in the forenoon, for a new trial of this cause.

Dated —.

[Signature.]

[Address.]

No. 153.

*Affidavit to move for a new trial on the ground of newly discovered evidence.*

[*Title of cause.*]

—— county, ss. C. D. being duly sworn, says: that he is the defendant in this action; that said action was tried at a circuit court [or, *special term of this court*] held in and for the county of ——, on the —— day of ——, 187—; that said trial resulted in a verdict for the plaintiff for —— dollars; that since the trial, and on the —— day of ——, 187—, deponent has discovered for the first time, that he could have proved by ——, who resides at ——, the following points, viz.: [*stating them.*]

Sworn, etc.

C. D.

No. 154.

*Order granting motion for a new trial.*

At a special term, etc.

[*Title of cause.*]

A motion for a new trial, on the part of the plaintiff herein, having been made on the case [or, *exceptions, or, case containing exceptions,*] and upon reading and filing the affidavit of ——, of counsel for the plaintiff in support of said motion, and after hearing ——, of counsel for the defendant, in opposition; *Ordered, (\*)* that the said motion for a new trial be, and the same is, hereby granted [or, *granted, with costs to abide the event, or, on payment of all costs of the action after notice of trial, or, on condition that the plaintiff stipulate, etc.*]

No. 155.

*Order granting motion for a new trial, unless the opposite party will consent to reduce amount of his verdict.*

[*As in No. 154 to (\*), then.:*] that the said motion for a new trial be, and the same hereby is, granted, unless the plaintiff shall, within



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——— days stipulate to reduce the amount of the verdict to —— dollars [or, *unless the defendant shall, within —— days, stipulate to receive the sum awarded to him by the verdict, for his counterclaim herein;*] in which case the motion is denied [*without costs.*]

---

No. 156.

*Order denying motion for a new trial.*

[*As in No. 154 to (\*), then add.:*] that the said motion be, and the same hereby is, denied [*with costs.*]

---

No. 157.

*Notice of motion to open inquest or default.*

[*As in No. 31 to (\*), then.:*] that the inquest and verdict [or, *as the case may be,*] taken in this action be set aside; and for such other and further relief, etc.

Dated———.

[*Signature.*]

[*Address.*]

---

No. 158.

*Order opening inquest or default.*

[*As in No. 35 to (\*), then.:*] the default taken herein be opened, and the verdict and all subsequent proceedings be set aside, on payment, by the defendant, to the plaintiff, of —— dollars costs, within —— days from the date hereof, [or, *otherwise, according to the terms imposed.*]

CHAPTER XII.

JUDGMENT.

No. 159.

*Notice of application for judgment.*—See No. 17.

See Vol. I., p. 337, and note 4.

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No. 160.

*Order for judgment, to be indorsed on draft of judgment for special relief.*

At a special term, etc.

[*Title of cause.*]

*Ordered*, that on filing the papers within mentioned, judgment be entered in this action, for the plaintiff against the defendant, in accordance with the within draft judgment [*with* —— *dollars, costs of this motion.*]

---

No. 161.

*Order for judgment, and for a reference to ascertain damages.*

At a special term, etc.

[*Title of cause.*]

This action having been brought to a trial by the court [*a trial by jury having been duly waived*] and a decision having been rendered therein, in favor of the plaintiff, and filed; and it appearing from the complaint, that the action is for the recovery of money only, [*or, is for the recovery of personal property,*] with damages for the withholding

thereof; and that in ascertaining the amount of such damages the examination of a long account will be necessary; now, on motion of — of counsel for the plaintiff, it is *adjudged* that the plaintiff do recover of the defendant the damages by him sustained on account of the cause of action alleged in the complaint. And further, it is *ordered* that it be referred to — of —, to ascertain and assess the said damages, and report the same to this court, with all convenient speed.

---

No. 162.

*Judgment for the plaintiff, when the answer sets up only a counterclaim less than the plaintiff's claim.*

See. Vol. I., p. 337 and note 4.

[Caption.]

[Title of cause.]

The plaintiff having filed with the clerk a statement, admitting the counterclaim contained in the answer of the defendant [or, *defendants E. F. & G. H.*,] it is now, on motion of — etc., *adjudged* that the plaintiff recover of the defendant [or, *defendants E. F.*, etc.] — dollars, being the excess of the plaintiff's claim over the said counterclaim; with — dollars, costs of the action, making together — dollars.

---

No. 163.

*Judgment upon demurrer.*

[Caption.]

[Title of cause.]

This action having been brought to trial upon the issue of law arising upon the complaint and the demurrer thereto [or, *complaint, answer, and demurrer to the answer, or, complaint, answer, reply and demurrer to the reply,*] and it appearing to the court that the — is entitled to judgment upon the said demurrer, it is *adjudged* that [insert appropriate relief.]

## No. 164.

*Judgment on a verdict.*

[Caption.]

[Title of cause.]

This action having been brought on for trial before the Hon. —, a justice of this court and a jury, at a circuit [or, *trial term of this*] court, held at — in the county of — on the — day of — 187—, and (\*) the issues having been tried, (†) and a verdict for the plaintiff [or, *defendants*] having been rendered [*and their costs having been adjusted at — dollars*]; it is now, on motion of —, of counsel for said —, *adjudged* that the said plaintiff recover of said defendants — dollars, found by the jury, with — dollars costs [or, *that the defendants have judgment against the plaintiff, upon the issues in this action, for the sum of — dollars*; or, *state special relief, if any.*]

---

## No. 165.

*Judgment on a verdict—inquest taken.*

[*As in No. 164 to (\*), then:*] an inquest having been duly taken, no affidavit of mirits having been filed or served, and the defendant not appearing; and a verdict for the plaintiff having been duly rendered; it is now, on motion of —, of counsel for the plaintiff, *adjudged* that the said plaintiff recover of said defendant — dollars, found by the jury, with — dollars costs.

---

## No. 166.

*Judgment for costs, on a non-suit at the trial.*

[*As in No. 164 to (\*), then:*] the allegations and proofs on the part of the plaintiff having been heard and considered, and said judge having directed the complaint in this action to be dismissed; it is now, on motion of —, of counsel for the said defendant, *adjudged* that the defendant recover of the plaintiff — dollars, his costs and disbursements of this action.

## No. 167.

*Judgment in favor of all the plaintiffs, against a part of the defendants.*

[As in No. 164 to (†), then :] and a verdict having been rendered in favor of all the plaintiffs against the defendants, C. D. and E. F., and in favor of the defendant, G. H., against all the plaintiffs ; now, on motion of ———, for the plaintiffs, it is *adjudged* that the said plaintiffs recover of the defendants, C. D. and E. F., ——— dollars, found by the jury, with ——— dollars, costs of the action ; making, together, ——— dollars, [or, *in case of special relief, state it.*] And on motion of ———, counsel for the defendants, it is further *adjudged* that the complaint be dismissed on the merits of the action, as against the defendant, G. H., and that he recover of all the plaintiffs ——— dollars, costs of the action.

## No. 168.

*Judgment in favor of a part of the plaintiffs, against all the defendants*

[As in No. 167 to (†), then :] and a verdict having been rendered in favor of the plaintiffs, A. B. and C. D., against all the defendants, and in favor of the said defendants against the plaintiff, A. B. ; now, on motion of ———, counsel for the plaintiffs, it is *adjudged* that the said plaintiffs, A. B. and C. D., recover of all the defendants ——— dollars, found by the jury, with ——— dollars, costs of the action ; making, together, ——— dollars, [or, *in case of special relief, state it.*] And, on motion of ———, counsel for the defendants, it is further *adjudged* that, as to the plaintiff, J. K., the complaint be dismissed, upon the merits of the action, and that the defendants recover of the said plaintiff, J. K., ——— dollars, costs of the action.

## No. 169.

*Judgment in favor of a part of the plaintiffs, against a part of the defendants.*

[As in No. 167 to (†), then :] and a verdict having been rendered in favor of the plaintiffs A. B. & C. D., against the defendants E. F. & G.

H., and against the plaintiff, V. W., in favor of all the defendants; and in favor of the defendant J. K., against all the plaintiffs; now, on motion of —— counsel for the plaintiffs, it is *adjudged* that the said plaintiffs, A. B. & C. D., recover of the defendants, E. F. & G. H., —— dollars, found by the jury, with —— dollars, costs of the action; making together, —— dollars; [or, *in case of special relief state it.*] And it is further *adjudged* that, as to the said plaintiff, V. W., the complaint be dismissed upon the merits of the action, as against all the defendants, and that they recover of the said V. W., —— dollars, costs of the action.

And it is further *adjudged* that the complaint be dismissed, on the merits of the action, as against the defendant J. K., and that he recover of all the plaintiffs —— dollars, costs of the action.

---

No. 170.

*Judgment upon a verdict, for defendant.*

[Caption.]

[Title of cause.]

This action having been brought to a trial by jury, and a verdict having been found for the defendant; it is now, on motion of counsel for said defendant, *adjudged* that the complaint therein be dismissed upon the merits of the action; and that the defendant recover of the plaintiff —— dollars, costs of the action.

---

No. 171.

*Judgment on a verdict subject to the opinion of the court.*

[Caption.]

[Title of cause.]

A verdict having been taken in this cause for the plaintiff, subject to the opinion of the court, at the general term, on a case to be made by the plaintiff, and the case having been heard at said term; now on motion of —— counsel for the defendant, and after hearing —— for the plaintiff, it is *adjudged* that the said plaintiff do recover of said

defendant ——— dollars, found by the jury, with ——— dollars costs :  
 [or, *that the complaint in this action be dismissed, on the merits of the action,*  
*and that the defendant recover of the plaintiff* ——— dollars, costs of the  
 action.]

---

No. 172.

*Judgment on a trial of issues of fact by the court.*

At a special term [*as in No. 35.*]

This action having been brought to a trial by the court [*a trial by jury having been duly waived,*] and a decision therein having been rendered in favor of the plaintiff [or, *defendant,*] and filed ; now on motion of ——— counsel for said ——— ; it is *adjudged*, etc.

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No. 173.

*The like ; where a reference has been had, since the trial.*

[*Caption.*]

[*Title of cause.*]

The issues in this action having been tried by the court, without a jury, and the written decision of the justice holding said court having been made, bearing date the — day of —, 187—, and duly filed, and an order of reference thereon made, bearing date the — day of —, 187—, duly entered, and the report of the referee thereon, bearing date the — day of —, 187—, made and filed, by which it appears [*state conclusions of report.*] now, therefore, on due proof [*that the complaint and notice of the pendency of this action was filed on the — day of —, 187—, in the office of the clerk of the county of —, and*] of the service of due notice of hearing of this action, on all the defendants, and on motion of —, counsel for the plaintiff, and after hearing — for the defendant ; it is *adjudged*, etc.

No. 174.

*Judgment upon a trial as to one defendant, and default as to another.*

[Caption.]

[Title of cause.]

This action having been brought to trial at a special term of this court, upon the issue joined on the complaint and the answer of the defendant C. D., and the defendant having been duly served with the summons and complaint, and having appeared by —, his attorney, and his time to answer having expired, and no answer from him having been received, and a trial having been had, and testimony taken, and counsel for the respective parties having been heard, and a decision thereon made and filed; now, on motion of —, plaintiff's attorney; it is *adjudged*, etc. [*state relief*.]

---

No. 175.

*Judgment where a part of the issues were tried with a jury, and a part without, and questions of law were reserved.*

At a special term, etc.

[Title of cause.]

This action having been tried before the Hon. —, a justice of this court, and a jury, as to certain issues, and by the said justice without a jury, as to the residue; and the questions of law having been reserved for argument before said justice; and the same having been argued; now, on motion of —, counsel for the defendant; it is *ordered* and *adjudged*, that the complaint be, and the same is, hereby dismissed without costs to either party, as against the other.

---

No. 176.

*Order for judgment, with leave to turn the case into a bill of exceptions or special verdict.*

[Caption.]

[Title of cause.]

This action having come on for hearing upon the case made, subject to the opinion of the court, and on motion of —, counsel for the



defendant, after hearing —, counsel for the plaintiff, in opposition; it is *ordered*, that judgment be rendered for the defendant, subject to the provision in the case, allowing either party to turn the case into a bill of exceptions or special verdict; the usual time for the service of such bill of exceptions or special verdict, and amendments, and for settlement thereof, being hereby granted, to commence from the date of the entry of this order.

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No. 177.

*Judgment for surrender of a document.*

At a special term, etc.

[*Title of cause.*]

This action having been brought to trial by the court [*a trial by jury having been duly waived,*] and a decision thereon having been rendered for the plaintiff, and filed, it is now, on motion of —, counsel for the plaintiff, *adjudged*, that the contract set forth in the complaint was made under a mistake of material facts, on the part of the plaintiff, and is therefore voidable by him; that the defendant surrender the same, to be cancelled; and that the plaintiff recover of the defendant — dollars, costs of the action.

---

No. 178.

*Judgment for specific performance.*

[*Title and caption as above.*]

This action having been brought to a trial by a jury, and a verdict therein rendered for the plaintiff; it is now, on motion of —, counsel for the plaintiff, *adjudged* that the defendant forthwith execute and deliver to the plaintiff, a conveyance, with full covenants, to be approved by a justice of this court, of the premises described in the complaint; and that the plaintiff also recover of the defendant — dollars, costs of the action [*vary relief according to the facts.*]

## No. 179.

*Notice of motion to set aside a regular judgment by default.*

See Vol. I., p. 369, and note 16.

[*Title of cause.*]

Sir :

Take notice that on affidavits, copies of which are annexed [*and a copy of the defendant's proposed answer also annexed,*] the undersigned will move the court, at a special term to be held at —, on the — day of — next, at — o'clock in the —noon, or as soon thereafter as counsel can be heard, [*or, will move, before the Hon. —, justice of this court, at his office in —, on the — day — of — next, at — o'clock in the —noon*] that the (\*) judgment entered against the defendant by default, and all subsequent proceedings in this action, be set aside, (†) upon such terms as to the court may seem just [*and that the moneys levied thereon be restored to the defendant,*] and for such other relief as may be just.

Dated, etc.

[*Signature.*][*Address.*]

## No. 180.

*Notice of motion to set aside an irregular judgment by default.*

[*As in No. 179 to (†), then :*] with costs, upon the grounds, among others, of irregularity ; viz., in that the judgment was entered by the plaintiff in disobedience of an order for a stay of proceedings, duly entered and served upon him [*or, any other irregularity ;*] and for such other relief as may be just.

Dated, etc.

[*Signature.*]

## No. 181.

*Notice of motion to set aside inquest.*

[*As in No. 179 to (\*), then add :*] inquest taken in this action, and all proceedings on the part of the plaintiff, subsequent thereto, be set aside [*concluding as in Nos. 176 and 180.*]

## No. 182.

*Order setting aside judgment on the application of a subsequent purchaser or mortgagee.*

[*Caption.*]

[*Title of cause.*]

On reading and filing the annexed affidavits of ——— [and proof of service of notice of this motion] and on motion of ———, counsel for V. W. [and after hearing ——— of counsel for the plaintiff in this action,] it is ordered that the judgment [confessed by C. D. in favor of A. B. and entered on the ——— day of ——— 187—,] be vacated and set aside, as to the said V. W., and as to the real estate herein after described; and that the execution issued on said judgment, and all proceedings had under it, be set aside, so far as they relate to, or affect, the said real estate; and that such real estate is hereby made and declared to be freed and discharged of and from the apparent lien of the said judgment, and of and from any and every and all proceedings whatsoever, under and by virtue of the same. The premises above referred to are bounded and described as follows, viz.: [*description.*]

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No. 183.

*Order to show cause why judgment, etc., should not be set aside—on application of a defendant.*

[*Title of cause.*]

On the pleadings in this action, [*the order to refer, and the papers on which the motion to refer was founded,*] on the judgment roll filed therein, [*and the report and finding of the referee,*] and on the affidavits and papers hereunto annexed, [and on such other affidavits and papers as may be served upon the plaintiff's attorney within two days prior to the time of hearing herein mentioned,] let the plaintiff and his said attorney show cause before one of the justices of this court, at chambers, [or, before this court at a special term thereof to be held at ———] on the ——— day of ——— next, at ——— o'clock in the ——— noon, why the judgment entered in this cause should not be set aside and vacated; [*why the order of reference therein should not be set aside;*] why the defendants should not be permitted to file a further or amended answer to the complaint in this action; [*and why the issues joined in*

*the said action should not be tried by a jury:]* and for such other or further order as the said court may deem meet.

And, in the meantime, and until the hearing and determination of the motion under this order, let all proceedings upon the execution issued on the said judgment be stayed.

Dated, etc.

[*Judge's signature.*]

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No. 184.

*The like—on application of a person not a party.*

[*Title of cause.*]

On the annexed affidavits, let all further proceedings under the execution issued on the judgment of A. B. against C. D., be stayed until the further order of this court. And on the said affidavits and such others as V. W. may serve upon A. B., the plaintiff, or his attorney, within —— days after the date of this order, let the said plaintiff show cause before this court at a special term thereof to be held at ——, [or, *before one of the justices of this court, at chambers,*] on the —— day of —— next, at —— o'clock in the —— noon, why the said judgment, and the execution issued thereon, should not be set aside as against the said V. W., as fraudulent and void [*and on the ground among others of irregularity in that ——, etc.;*] and why the said V. W. should not have such other and further relief, as may be just; with costs of motion

Dated, etc.

[*Signature of judge.*]

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No. 185.

*Judgment on failure to answer.*

See Vol. I., p. 193, and note 4; id. 372, and note 18; and Forms Nos. 20 and 21 ante, pp. 481, 482.



## BOOK II.

### PROCEEDINGS SUBSEQUENT TO THE DECREE (JUDGMENT.)

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#### CHAPTER I.

##### APPEALS.

No. 186.

*Notice of judgment to limit time for appealing.*

See Vol. I., p. 375; id. 395, and note 14; id. 398, and note 18.

[*Title of cause.*]

Sir :

Take notice that judgment was entered in this action, in favor of the plaintiff, for —— dollars, in the office of the clerk of the county of ——, on the —— day of ——, 187—, and affirming the judgment previously recovered by him, in this action.

Dated, etc.

J. C., Plaintiff's attorney.

To A. P., Defendant's attorney.

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No. 187.

*Notice of appeal to the general term.*

See Vol. I., p. 398, and note 18; id. 399, and note 19; id. 400, and note 20; id. 405, and note 22.

[*Title of cause.*]

Take notice that the plaintiff, A. B., [or, *defendant E. F.*,] appeals to the general term of this court, from the judgment [or, *order*] entered in this action, on the ——— day of ———, 187—, [or, from so much of the judgment entered in this action, on etc., as directs that—etc.]

Dated, etc.

J. D., Att'y for the appellant.

To the clerk of ——— county,

and to ———, Esq., attorney for the defendant.

No. 188.

*Notice of appeal to the court of appeals.*

See Vol. I., p. 400, note 20; id. 408, note 26.

[*Title of cause.*]

Take notice that the plaintiff, A. B., [or, *the defendant, C. D.*,] appeals to the court of appeals from the judgment [or, *order*,] of the general term of the [supreme] court in this action, entered on the ——— day of ———, 187—, affirming [or, *reversing*] the judgment [or, *order*] of the special term, [or, *of the ——— court*,] entered on the ——— day of ———, 187—.

Dated ———.

[*Signature.*]

To ———, Esq., attorney for ———,

and the clerk of ——— county.

No. 189.

*Undertaking, upon appeal to general term, or court of appeals.*

See Vol. I., p. 399, note 19; id. p. 405, note 22; id. 408, note 27.

[*Title of cause.*]

Whereas, in a certain action brought in the supreme court of New York, by A. B., plaintiff, against C. D., defendant, judgment was

perfected against the said C. D., and in favor of the said A. B., for ——— dollars, damages and costs, [or, *for the specific performance of a contract,*] from which said judgment the said C. D. has appealed to the general term of said court, [or, *to the court of appeals,*] now, therefore, we, C. D., the said appellant and E. F., of —, in the county of——, and G. H., of ———, in the county of ———, do undertake that the said appellant will pay all the costs and damages which may be awarded against ———, on the said appeal, not exceeding the sum of five hundred dollars.

[*The above will suffice to render the appeal effectual. If it is sought to stay the proceedings, add the following clause:*]

And we do also undertake that if the judgment appealed from or any part thereof be affirmed, or the appeal be dismissed, the said appellant will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the said appellant upon the said appeal.

Dated ———.

[*Signatures.*]

*Acknowledgment.*

county, ss. I certify that on this — day of —, 18—, before me came C. D., E. F. and G. H., to me personally known to be the persons described in and who executed the foregoing undertaking, and severally acknowledged the execution thereof.

[*Signature of officer.*]

*Affidavit of sufficiency of sureties.*

—— county, ss. C. D., E. F. and G. H., above named, being severally duly sworn by me, each for himself, deposes and says, and first the said C. D. says he is a house [or, free] holder, residing in —, and is worth [double the sum specified in undertaking] — dollars over and above all debts and responsibilities he owes or has incurred; and the said E. F. says he is a freeholder and resides in —, and is worth [double, etc.,] — dollars over and above all debts and responsibilities he owes or has incurred; and the said G. H. says he is a householder and resides in —, and is worth [double, etc.,] — dollars over and above all debts and responsibilities he owes or has incurred.

Sworn, etc.

[*Signature.*]



APPENDIX OF PRECEDENTS.

*Judge's approval, indorsed.*

I approve of the within undertaking, and of the sufficiency of the sureties therein named.

Dated —.

[*Judge's signature.*]

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No. 189.

*Waiver of security on appeal.*

See Vol. I., p. 398, note 16 ; id. 413, note 38.

[*Title of cause.*]

The [plaintiff] hereby consents that the [defendant] may appeal to the —, from the judgment [or, *order*] entered in this action on the — day of —, 187—; and that proceedings under the said judgment [or, *order*] shall be stayed until the decision of the said appeal, without security.

Dated —.

[*Signature.*]

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No. 190.

*Notice of exception to sureties in undertaking.*

[*Title of cause.*]

Sir :

Take notice that the respondent excepts to the sureties in the undertaking on appeal, in this case, offered by the appellant.

Dated —.

J. C., Attorney for respondent.

To A. P. Esq., Attorney for appellant.

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No. 191.

*Notice of justification by sureties.*

[*Title of cause.*]

Sir :

Take notice that the sureties in the undertaking upon appeal, in this action, will justify before Hon. — a justice of this court [or, *Hon.*

APPENDIX OF PRECEDENTS.

—— county judge of —— county] at —— on the —— day of —— next, at —— o'clock in the —— noon.

Dated ——.

[Signature.]

[Address.]

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No. 192.

*Affidavit to obtain a stay of proceedings, on appeal from an order directing the delivery of personal property.*

[Title of cause.]

—— county, ss: C. D., the defendant above named, being duly sworn, says: That on the —— day of —— 187—, an order was entered in this action, at a special term of this court, directing the deponent to deliver to the plaintiff certain property, alleged to be in his custody or control; that the value of said property is not more than ——dollars; that deponent intends, in good faith, to [or, *has perfected an*] appeal from said order; and that he will suffer serious inconvenience and loss, if proceedings under said order are not stayed until the decision of such appeal, [*state the reasons.*]

Sworn etc.

C. D.

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No. 193.

*Notice of motion for stay of proceedings.*

See Vol. I., p. 388, note 10; id. 390, note 11.

[Title of cause.]

Sir:

Take notice, that on the affidavit of which a copy is herewith served, and on all the proceedings in this action, the undersigned will move the court, at a special term thereof to be held at —— on the —— day of —— next, at —— o'clock in the —— noon, for an order staying all proceedings on the part of the respondent, under the order [or, *judgment*] entered in this action on the —— day of —— 187—, until the decision of the general term (or *court of appeals,*) upon

the appeal taken from the said order [or, *judgment*] by the appellant ; or for such other relief as may be just.

Dated \_\_\_\_\_.

A. P., Attorney for appellant.

To J. C. Esq., Attorney for respondent.

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No. 194.

*Order to stay proceedings.*

At a special term, etc.

[*Title of cause.*]

On reading and filing the affidavit of C. D., and on a motion of \_\_\_\_\_ for the defendant, and after hearing \_\_\_\_\_, [or, *on reading and filing proof of service of notice of this motion, and no one appearing*] for the [*plaintiff*] in opposition thereto ; ordered that [upon the appellant's filing with the clerk of \_\_\_\_\_ county, an undertaking, in due form, to stay proceedings, for the payment of \_\_\_\_\_ dollars in case of the failure of the appellant to comply with the adjudication of the court upon the appeal taken by him from the order made at a special term, in this action on the \_\_\_\_\_ day of \_\_\_\_\_ 187-,] all proceedings by or on behalf of the respondent, under the order so appealed from, be stayed until the decision of the said appeal.

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No. 195.

*Notice of argument of appeal.*

See Vol. I., p. 404, and note 21 ; id. p. 416.

[*Title of cause.*]

Sir :

Please to take notice, that the appeal in the above cause will be brought on for argument before this court at the next general term thereof, to be held at the court house in the city [or, village] of \_\_\_\_\_,

APPENDIX OF PRECEDENTS.

on the — of —, 18—, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Dated the — day of —, 187—.

Yours, etc.,

A. P., Attorney for appellant.

To J. C., Esq., Attorney for respondent.

Due service of a notice of which the above is a copy, is admitted this — day of —, 18—.

J. C., Attorney for respondent.

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No. 196.

*Note of issue, for argument of appeal.*

SUPREME COURT—GENERAL TERM.

A. B., plaintiff and  
[*appellant*]

*against*

C. D., defendant and  
[*respondent.*]

Appellant's note of issue.

J. C., Plaintiff's attorney.

A. P., Defendant's attorney.

Appeal.

Notice of appeal served —, 187—, [or, *in case appeal is from an inferior court, say: "Issue joined on" —, etc., giving date of filing return.*] Number of cause on previous calendar —, [or, *not on previous calendar.*]

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No. 197.

*Notice of argument of appeal.*

See Vol. I., p. 404, note 21; id. p. 405, note 22.

[*Title of cause.*]

Sir:

Take notice that the appeal from the judgment [or, *order made on the — day of —, 187—,*] in this action will be brought to a

hearing [*and a motion made to dismiss the same*] before this court at a [general] term thereof, to be held at the ———, in ———, on the ——— day of ——— next, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Dated ———.

[*Signature.*]

[*Address.*]

---

No. 198.

*Notice of argument in court of appeals.*

COURT OF APPEALS.

A. B., plaintiff and  
[*respondent*]

*against*

C. D., defendant and  
[*appellant.*]

Sirs :

The appeal herein, which originated in the ——— judicial district, will be brought on for argument at the next term of this court, to be held at the capitol in the city of Albany, on the ——— day of ———, 187—, at the opening of the court on that day, or as soon thereafter as counsel can be heard, and will be moved as a preferred cause, on the ground that ———.

Yours, etc.

———, Attorney for

To ———, Esq., Attorney for ———,

and the clerk of the court.

Due service of a copy of the above notice is hereby admitted, this ——— day of ———, 187—.

———, Attorney for

No. 199.

*Notice of motion to dismiss appeal.*

See Vol. I., p. 398, note 17; id. page 413, note 29.

[*Title of cause.*]

Sir:

Take notice that on [*the affidavits and other papers*] herewith served, the respondent will move the court, at a [*general*] term thereof, to be held at ———, on the ——— day of ——— next, at the opening of the court, or as soon thereafter as counsel can be heard, for an order dismissing the appeal from the judgment, [or, *from the order made on the ——— day of ———,*] in this cause, [*if motion be made on the ground of irregularity, say:*] for irregularity in the following particulars, viz.: ———; and for such other relief as may be just, with costs of motion.

Dated ———.

[*Signature.*]

To ———, Attorney for ———.

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No. 200.

*Order dismissing appeal*

At a general term [*as in No. 35.*]

[*Title of cause.*]

On reading and filing notice of motion, and affidavit of ———, and on motion of ———, for the respondent, after hearing ———, [*or, no one appearing*] for the appellant; *ordered* that the appeal taken by A. B., from the judgment [*or, order*] entered herein on the ——— day of ———, 187—, be dismissed with ——— dollars costs to the respondent.

---

No. 201.

*Judgment dismissing appeal*

[*As in No. 202 to (\*), then:*] that the said appeal be dismissed with ——— dollars costs to the respondent.

No. 202.

*Judgment or order of affirmance.*

At a general term, etc.

[*Title of cause.*]

The appeal from the judgment [or, *order*] entered in this action on the —— day of ——, 187-, in favor of the ——, having been heard at the general term, it is now, on motion of ——, for the respondent, after hearing ——, for the appellant, *adjudged* (\*) [or, *ordered*] that the said judgment [or, *order*,] be affirmed with —— dollars, costs to the respondent.

---

No. 203.

*Order modifying and affirming judgment, etc.*

[*As in No. 202 to* (\*)*, then add:*] that the said judgment [or, *order*] be modified by inserting, at the end of the entry thereof, the following clause: “ ——;” and that the said judgment [or, *order*] of the special term, as thus modified, be and the same hereby is affirmed.

---

No. 204.

*Judgment of reversal.*

[*As in No. 202 to* (\*)*, then :*] that the said judgment be reversed, and a new trial ordered ; costs to abide the event, [or, *reversed, and the complaint be dismissed, and that the appellant recover —— costs, or otherwise, from the respondent.*]

[To the above, may be added a provision for *restitution*, as follows:]

And it appearing to the court that, notwithstanding the appeal herein, the respondent has collected the amount of the judgment below, with costs and sheriff's fees, to wit, the sum of —— dollars, it is further *ordered* and *adjudged* that the said respondent make restitution to the said appellant by paying into court to the county treasurer of the county of —— within —— days after service of this

judgment on him or his attorney, the said sum of —— dollars, with interest from the —— day of —— 18—, the date of such collection by the respondent, to abide the order of this court after such new trial has been had; [or, instead of directing payment into court, say: *by paying to the appellant, or his attorney, within ——, etc.*]

---

## No. 205.

*Order for reversal unless respondent consents to reduce amount.*

[*As in No. 202 to (\*), then:*] that the judgment in this action be reversed, and a new trial granted therein, with costs to abide the event; unless the plaintiff consents to reduce the amount of the recovery for damages [or, *for the debt and interest*] to —— dollars as of the —— day of ——; and if the amount of the judgment be so reduced, then it is *ordered* that the judgment, as thus reduced, be in all things affirmed, with costs already adjusted, and the costs of this appeal.

---

## No. 206.

*Judgment thereon.*

At a general term, etc.

[*Title of cause.*]

The defendant in this action having appealed to the general term of this court from the judgment entered on the —— day of ——, in favor of the plaintiff; and the annexed decision of the said court, thereon, having been made and filed, whereby said judgment is affirmed in case the plaintiff shall consent to reduce the amount of the recovery for damages [or, *for the debt and interest*] to —— dollars, as of the —— day of ——; and the plaintiff having consented to such reduction; now, on motion of —— for the plaintiff, it is *adjudged* that the said judgment, as thus reduced in amount, be affirmed, with —— dollars costs to the respondent.



No. 207.

*Judgment on an appeal by both parties.*

At a general term, etc

[*Title of cause.*]

This cause having been brought to a hearing upon an appeal taken by the plaintiff from that part of the judgment entered in this action on the ——— day of ———, 187—, at a special term held before the Hon. ———, a justice of this court, which is in the words following, viz.: [*reciting it,*] and ——— having been heard for the plaintiff, and ——— for the defendant; it is now *ordered* and *adjudged* that the portion of said judgment so appealed from by the plaintiff, be, and the same hereby is, in all things reversed.

And the appeal of the defendant from the whole of said judgment having also been brought to a hearing, and the same counsel for the said parties respectively, having been heard; it is now *ordered* and *adjudged* that all that part of the said judgment of the special term which is appealed from by the plaintiff and is in the following words, viz.: [*reciting, as before*] be, and the same hereby is, in all things reversed. And this court, proceeding to direct, in lieu thereof, such order and judgment in the premises as ought in that behalf to have been made at the said special term; it is *ordered* and *adjudged* etc.

No. 208.

*Notice of motion for re-argument of appeal.*

See Vol. I., p. 422, note 39.

[*Title of cause.*]

Sir:

Take notice that the undersigned will move the court [*at a general term thereof, to be held*] at ———, on the ——— day of ——— next, for an order allowing the appeal taken from the judgment [*or, order*] entered in this cause on the ——— day of ———, to be re-argued, and staying the entry of the judgment [*of affirmance*] in the meantime; or for such other relief as may be just.

Dated, ———.

[*Signature.*]

To ———, Esq., Attorney for ———.

No. 209.

*Order for re-argument of appeal.*

At a general term, etc.

[*Title of cause.*]

On reading and filing notice of motion [*and the affidavit of* ———,] and on motion of ——— for the appellant, and hearing ——— for the respondent; *ordered* that the appeal from the judgment [or, *order*] entered herein on the ——— day of ———, be re-argued; and that the entry of the judgment [*of affirmance*] heretofore rendered be stayed until the decision of the court upon such re-argument.

---

No. 210.

*Notice of filing remittitur from court of appeals.*

See Vol. I., p. 422, note 40.

[*Title of cause.*]

Sir :

Take notice that the *remittitur* in the above action has been filed in the office of the clerk of the county of ———, [or, *of this court,*] and that on the ——— day of ———, I shall move this court, at a general term thereof, to be held at ———, at ——— o'clock in the ——— noon, or as soon thereafter as counsel can be heard, for an order that judgment be entered thereon.

Dated ———.

[*Signature.*]

To ———, Esq., Attorney for ———.

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No. 211.

*Order for judgment on filing remittitur.*

At a general term, etc.

[*Title of cause.*]

A. B., having appealed to the court of appeals from the judgment of the general term of this court, bearing date the ——— day of ———, 187—, which judgment was signed by the clerk of this court, and duly

APPENDIX OF PRECEDENTS.

entered in his office, on the — day of —, 187—; and said court of appeals having affirmed the judgment of this court; now, on reading\* and filing the *remittitur* from the said court of appeals, and on motion of —, attorney for the respondent, it is *ordered*, that the judgment of the court of appeals be, and the same hereby is, made the judgment of this court; and that the respondent have execution thereon.

CHAPTER II.

EXECUTION OF JUDGMENT.

No. 212.

*Execution against the person.*

See Vol. I., p. 441, notes 1, 2.

The people of the State of New York, to the sheriff of the [city and] county of —, greeting :

Whereas judgment was rendered on the — day of —, one thousand eight hundred and —, in an action in the — court, between A. B., plaintiff, and C. D., defendant, in favor of the said A. B. [or, C. D.,] against the said C. D., [or, A. B.,] for the sum of — dollars, as appears to us by the judgment roll, filed in the office of the clerk of the — county of —, [or, *city and county of*]; and, whereas the said judgment was docketed in your county on the — day of —, in the year one thousand eight hundred and —, and the sum of — dollars is now actually due thereon; and whereas an execution against the property of the judgment debtor has been duly issued to the sheriff of the proper county and returned unsatisfied: therefore we command you, that you arrest the said judgment debtor and commit him to the jail of your county until he shall pay the said judgment, or be discharged according to law. And that you return this execution within sixty days after its receipt by you, to the clerk of the county of —, [*specifying the clerk with whom the record is filed.*]

Dated —.

J. C., Plaintiff's attorney.

No. 213.

*Indorsement on execution against the person*

[*Title of cause.*]

*Execution against the person.*

J. C., Plaintiff's attorney.

To the sheriff of the county of ———.

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No. 214.

*Execution against property.*

See Vol. I., p. 441, note 2.

The people of the State of New York, to the sheriff of the [*city and*] county of ——— greeting :

Whereas, judgment was rendered on the ——— day of ——— one thousand and eight hundred and ———, in an action in the supreme court, between A. B., *plaintiff*, and C. D., *defendant*, in favor of the said *plaintiff* against the said *defendant* for the (\*), sum of ——— dollars and ——— cents, as appears by the judgment roll filed in the office of the clerk of the county of ———. And whereas, the said judgment was docketed in your county on the ——— day of ——— in the year one thousand eight hundred and ——— and the sum of ——— dollars and ——— cents, with interest from ——— is now actually due thereon: Therefore, we command you, that you satisfy the said judgment (†) out of the personal property of said *defendant*; or if sufficient personal property cannot be found, then out of the real property in your county belonging to said *defendant*, [*or either of them,*] on the day when the said judgment was so docketed in your county, or at any time thereafter, in whosoever hands the same may be, and return this execution within sixty days after its receipt by you, to the clerk of the county of ——— [*clerk with whom record of judgment is filed.*]

Dated, ———.

J. C., Plaintiff's attorney.

No. 215.

*Indorsement on execution against property.*

[*Title of cause.*]

Execution to — county.

J. C., Plaintiff's attorney.

Levy \$ — with interest from the — day of — 18—, and return this execution within sixty days after its receipt by you to the — county clerk's office.

J. C., Plaintiff's attorney.

No. 216.

*Execution against joint property of all, and separate property of some of the defendants.*

[*As in No. 214 to (†), then :*] out of the joint personal property of all the defendants, and the separate personal property of the defendant — within your county; or if sufficient personal property cannot be found, then out of the real property within your county belonging jointly to all the defendants, or separately to the said —, on the day, etc. [*concluding as in No. 214.*]

No. 217.

*Execution against property in hands of executor, etc.*

[*As in No. 214 to (\*), then :*] as executor of the will, [or, *the administrator of, etc.,*] of — deceased, in favor of said A. B., and against said C. D., as such executor [or, *administrator*] as aforesaid, for the sum of — dollars [*proceed as in No. 214, to (†), then add :*] out of the personal property of the said [*deceased*] in the hands of the said C. D., as executor [or, *administrator*] in your county; and that you return [*concluding as in No. 214.*]

## No. 218.

*Execution for the delivery of possession of specific real property.*

See Vol. I., p. 441, note 2.

[*As in No. 214 to (\*)*, then : ] delivery to the said A. B., of the possession of the following described real property, viz. : [*describing it, particularly*] and also for — dollars, [*stating the sums recovered for damages, and for costs, in accordance with the judgment,*] as appears by the judgment roll, filed in the office of the clerk of the county of —.

And whereas, the said judgment was docketed in your county on the — day of —, 18—, and the sum of — dollars, with interest from the — day of —, 18—, is now actually due thereon; therefore we command you, that you deliver possession of the said real property to the said —; and that you satisfy the said sum of — dollars, with interest as aforesaid out of [*as in No. 194 to the end.*]

## No. 219.

*Execution for the delivery of possession of specific personal property.*

[*As in No. 214 to the (\*)*, then : ] delivery to the said A. B. of the possession of the following described personal property, viz. : [*describing it particularly,*] and if a delivery thereof cannot be had, then for — dollars, the value thereof, duly assessed; and also for — dollars for costs, as appears by the judgment roll filed in the office of the clerk of the county of —.

And whereas the said judgment was docketed in your county on the — day of —, 18—, and the sum of — dollars, with interest from the — day of —, 18—, is now actually due thereon [*and — dollars additional, with interest as aforesaid, in case the property is not delivered.*]

Therefore we command you, that you deliver the possession of said property to the said A. B., and that you satisfy the said sum of — dollars [*damages and costs*] with interest as aforesaid; and also, in case a delivery of said property cannot be had, the further sum of — dollars, with interest as aforesaid, out of [*as in No. 194 to the end.*]

No. 220.

*Writ of assistance to put plaintiff in possession of real estate.*

See Vol. I., p. 441; id. p. 531, note 46.

The people of the State of New York, to the sheriff of the county of —, greeting: Whereas, by a judgment of our supreme court, in an action between A. B., plaintiff, and C. D., defendant, entered in the office of the clerk of the county of —, on the — day of —, 18—, it was adjudged that the [*plaintiff*] should be put in possession of [*describe the premises,*] and, whereas the said A. B. has not been able to take possession thereof:

Therefore, we command you, that immediately upon the receipt of this writ, you enter upon the premises above described, and eject therefrom, every person holding the same, or any part thereof, adversely to the said A. B.; and that you forthwith put the said A. B. or his assigns, in full and quiet possession of the whole of the said premises, and cause him or them to be maintained in the peaceable possession thereof.

Witness, —, one of the justices of our said court, at —, this — day of —, 18—.

J. C., Attorney.

J. W. H., Clerk.

No. 221.

*Indorsement on execution upon a judgment by confession, where the debt is not all due.*

[*Title of cause.*]

Levy \$—, with interest thereon from the — day of — 18—, being the amount now due upon the judgment within mentioned; and also levy \$—, costs thereof, with interest thereon from the — day of —, 187—, besides your fees.

J. C., Plaintiff's attorney.

To the sheriff of the county of —.



APPENDIX OF PRECEDENTS.

No. 222.

*Indorsement on execution where the judgment is for a debt secured by mortgage.*

[*Title of cause.*]

Levy \$——, with interest from the —— day of —— 18——, besides your fees, but not out of any part of [*describing the property,*] being the premises mortgaged by the defendant to ——, by mortgage dated —— and recorded in the office of the clerk of the county of ——, in book —— of mortgages, page ——, to secure the debt for which the judgment herein was rendered.

J. C., Plaintiff's attorney.

To the sheriff of the county of ——.

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No. 223.

*Notice of motion for leave to issue execution.*

See Vol. I., p. 442, note 6.

[*Title of cause.*]

Sir :

Take notice that on the affidavit of which a copy is herewith served, and on the judgment and proceedings in this action, I shall move the court, at a special term thereof to be held at [*as in No. 24*] for leave to issue execution upon said judgment.

Dated ——.

J. C., Plaintiff's attorney.

[*Address—to defendant personally.*]

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No. 224.

*Order setting aside execution, and directing restitution.*

At a special term, etc.

[*Title of cause.*]

On reading and filing the affidavit of —— and on motion of —— for the defendant, and after hearing —— [or, *and on proof of service of due notice of this motion. and no one appearing*] for the plaintiff, in

opposition thereto; *ordered*, that the execution issued in this action be, and the same is hereby, set aside, with — dollars, costs; and that the moneys levied thereon be restored to the defendant, with interest thereon from the time of such levy.

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No. 225.

*Notice of sale of real estate, under a judgment.*

See Vol. I., p. 445, note 12, (p. 856, foot-paging.)

[*Title of cause.*]

By virtue of a judgment made in the above entitled action on the — day of — 18—, the subscriber, [*a referee for that purpose duly appointed,*] will sell at — in — on the — day of — next, at — o'clock in the — noon of that day, the real estate directed by said judgment to be sold, and therein described as follows, viz.: [*describe premises as in judgment.*]

Dated —.  
J. C., Plaintiff's attorney.

T. S., Sheriff.  
[or, W. O., Referee.]

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PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

No. 226.

*Affidavit to obtain order for examination of judgment debtor, after execution returned—on a judgment of supreme court.*

See Vol. I., p. 445, (868, foot-paging.)

[*Title of cause.*]

— county, ss. J. C., being duly sworn, says, that he is the attorney for the plaintiff [or, *the defendant*, whichever is the creditor in the judgment.] That judgment was duly rendered, in this action, against the above named defendant, C. D., [or, *plaintiff*, whichever is the debtor in the judgment] in (\*) this court, on the — day of —, 18—, for — dollars, damages and costs. That the judgment roll in said action was, on that day, filed in the office of the clerk of — county; and that said judgment has been docketed in said county.

[In case the judgment was in another court of record, add: *and that a transcript of said judgment was, on the — day of —, 18—, duly filed in the office of the clerk of — county.*] That an execution (†) upon the said judgment, against the property of the said defendant C. D., [or, *against the joint property of the defendants C. D. and E. F., and the individual property of the defendant, G. H.,*] was issued and delivered to the sheriff of the county of —, on the — day of —, 18—. (‡) That the said defendant, G. H., resided in said last mentioned county, at the time of the issuing of such execution, and still resides in said county, and had, and has, a place of business in said county, to wit, an office as —, at No. —, — street, in the city of — [or, *that G. H. did not then, and does not now, reside in this state.*] (§) That the said sheriff has duly returned said execution wholly unsatisfied [or, *unsatisfied except in the sum of — dollars;*] and that said judgment is still in force, and that it yet remains wholly unpaid and unsatisfied, [*except as aforesaid.*]

Sworn, etc.

J. C.

## No. 227.

*The like—on a judgment of some other court of record.*

[*As in No. 226 to (\*), then:*] the superior court of the city of —; [or, *the court of common pleas for the city and county of New York;* or, *the county court of the county of —;* or, *the city court of —, in this state,*] on the — day of —, 18—, for — dollars, damages and costs; that the judgment roll in said action was, on that day, filed in the office of the clerk of — county. [*Conclude as in No. 226.*]

## No. 228.

*The like—on a judgment of an inferior court, rendered in county where the application is made.*

[*As in No. 226 to (\*), then:*] a justice's court of the town of —, in the county of —, held by and before S. T., Esq., a justice of the peace of the said town of —; [or, *the district court in the city of New York, for the — judicial district;* or, *the marine court of the city*

of *New York*] on the ——— day of ———, 18—, for the sum of ——— dollars, to wit, ——— dollars, damages, and ——— dollars costs. That a transcript of said judgment was, on the ——— day of ———, 18—, duly filed in the office of the clerk of the [city and] county of ———. (\*) That an execution [*as in No. 226 from (†) to the end.*]

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No. 228.

*The like—on a judgment of an inferior court, to procure an examination in a different county.*

[*As in No. 227 to (\*), then:*] that a certified transcript of said judgment was, on the ——— day of ———, 18—, duly filed in the office of the clerk of the county of ———, and that an execution [*as in No. 226 from (†) to the end.*]

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No. 230.

*The like—on a judgment of a justice of the peace.*

[*Title of cause.*]

County of ———, ss. A. B., being duly sworn, says, that judgment was duly recovered in favor of A. B., plaintiff, against C. D., defendant, on the ——— day of ———, 187—, before ———, Esq., a justice of the peace, of the town of ———, in the county of ———, and state aforesaid, for ——— dollars damages, and ——— dollars costs, amounting in all to ——— dollars and ——— cents. That a transcript of said judgment was duly filed in the office of the clerk of ——— county, on the ——— day of ———, 187—, and said judgment duly docketed therein against said defendant.

That an execution against the property of the said C. D. was, on the ——— day of ———, 187—, duly issued upon said judgment and delivered to the sheriff of ——— county, where the said C. D. then resided and yet resides; that the said sheriff has duly returned said execution to the county clerk's office wholly [or, *partially*] unsatisfied, and that the said judgment is yet in force, and remains wholly [or, *partially*] unpaid and unsatisfied, [or, *remains unpaid and unsatisfied except in the sum of ——— dollars.*]

Sworn, etc.

A. B.

## No. 231.

*Order for examination of judgment debtor, after execution returned.*

See Vol. I., p. 869, (foot-paging.)

[*Title of cause.*]

It having been proved to me by the affidavit of — that judgment has been duly recovered in this court, in the above entitled action, in favor of A. B. [*and others*] plaintiff[s,] against C. D. [*and others*] defendant[s,] for the sum of — dollars, on the — day of — 18—, and that an execution upon the aforesaid judgment, against the property of the said C. D. [*one of the*] defendant[s,] and a judgment debtor in this action, has been duly issued to the sheriff of the proper county, viz.: the county of —, and that the said execution has been returned by the said sheriff wholly [or, *partially*] unsatisfied; and that the said judgment is yet in force, and remains wholly [or, *partially*] unpaid and unsatisfied, [or, *remains unpaid and unsatisfied except in the sum of — dollars.*] (\*) I do hereby order and require the said C. D. to appear before me at my office [or, *the chambers of the supreme court, at the city hall, in the city of —,*] on the — day of —, at — o'clock in the — noon, and on such other days as I, or the referee duly appointed for that purpose, shall name, to be examined and make discovery on oath concerning his property [or, *concerning the joint property of the defendants in this action, and the individual property of the defendant C. D.*] And the said judgment debtor, C. D., is hereby forbidden to transfer, or make any other disposition of any property belonging to him [or, *the joint property of the defendants above named, or, the individual property of the defendant, C. D.,*] not exempt from execution, or in any manner to interfere with such property, until these proceedings are terminated, or until further order in the premises.

Dated —.

[*Judge's signature.*]

## No. 232.

*Order for examination of judgment debtor and witnesses before a referee, after execution returned.*

[*As in No. 231 to (\*)*, then:] I do hereby order that —, Esq., of —, be and he is hereby appointed a referee, to examine the said

judgment debtor C. D., and take his answer and examination on oath concerning his property; and also to examine on oath such witnesses as may be offered by the respective parties, and to reduce all such answers and examinations to writing, and to report to me the same, and all his proceedings under and by virtue of this order and of the power vested in him as referee, with all convenient speed:

I do further order and direct the said C. D., judgment debtor, to attend and appear before the said referee, at the office of said referee, in the village of —, county of —, on the — day of —, 187—, at — o'clock in the — noon, and then and there to answer before said referee concerning such property as aforesaid; and also for such purpose to attend, appear and answer before said referee, from time to time, as he shall direct and appoint:

And the said judgment debtor C. D., is hereby forbidden, and I do order and direct that he be and is hereby restrained and enjoined from assigning, selling, transferring, incumbering, or in any manner interfering with any property, of whatever kind, belonging to him [or, *the joint property of the defendants above named, or the individual property of the defendant C. D.,*] not exempt from execution, until these proceedings are terminated, or until further order in the premises.

Dated —.

[*Judge's signature.*]

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No. 233.

*Affidavit of service of order on judgment debtor.*

[*Title of cause.*]

— county, ss. V. W., of the town of —, in said county, being duly sworn, deposes and says, that on the — day of —, 187—, at —, in said county, he served the within order on C. D., the judgment debtor within named, by delivering to and leaving with him personally, a true copy thereof, and at the same time showing to him the within original order and the judge's signature attached thereto. And deponent further says that he knew the person whom he so served to be the same for whom said order was intended, and who is mentioned and described in said order as judgment debtor.

Sworn, etc.

V. W.

APPENDIX OF PRECEDENTS.

No. 234.

*Affidavit to obtain order for examination of a judgment debtor, before execution returned.*

(See Code, § 292.)

[As in No. 226 to (†), then :] that the said C. D. now resides at —, in the county of —, and has property, to wit, [*specify property*] of the value of — dollars, now at —, in said county. That on the — day of —, 187–, at —, in — county, this deponent did request the said C. D. to apply the same in [part] satisfaction of said judgment, but that he, the said deponent, then and there refused to do so; and that said judgment is yet in full force, and remains wholly unpaid [*except that — dollars have been paid, or collected, thereon.*]

Sworn, etc.

[*Signature.*]

No. 235.

*Order for examination of judgment debtor, before execution returned.*

At a special term, etc. [*if made by court.*]

[*Title of cause.*]

It appearing to the satisfaction of this court [or, *of the undersigned,*] by the annexed affidavit of —, that C. D., a judgment debtor in the above entitled action, has property which he unjustly refuses to apply in satisfaction of the judgment herein; that said judgment is yet in full force, and remains wholly unpaid [*except that — dollars has been paid or collected thereon;*] it is hereby ordered and required that the said C. D. appear before this court, at —, in the county of —, on the — day of —, at — o'clock in the —noon, and on such other days as may be named by this court, [or, *if order is made by a judge, or a referee is appointed, require appearance before judge or referee, as in Nos. 210, 211,*] to be examined and answer concerning the said property. And the said C. D. is hereby forbidden to transfer, incumber, assign or make any other disposition of said property, or in any manner to interfere therewith, until these proceedings are terminated, or until further order in the premises.

Dated —.

[*Signature—if order is made by a judge.*]

No. 236.

*Order for examination of judgment debtor and witnesses, before a referee, after return of execution issued upon a justice's judgment.*

[*Title of cause.*]

It having been made to appear to me by the affidavit of —, that judgment was duly recovered in favor of A. B., plaintiff, against C. D., defendant, on the — day of —, 187—, before —, Esq., a justice of the peace of the town of —, in the county of —, and state aforesaid, for — dollars damages, and — dollars costs, amounting in all to — dollars. That a transcript of said judgment was duly filed in the office of the clerk of — county, on the — day of —, 187—, and said judgment duly docketed therein against said defendant C. D., and that an execution against the property of the said C. D., has been duly issued to the sheriff of the proper county upon the aforesaid judgment; and that such execution has been returned by the said sheriff wholly [or, *partially*] unsatisfied, and the said judgment is yet in force, and still remains wholly [or, *partially*] unpaid and unsatisfied [or, *remains unpaid and unsatisfied, except in the sum of — dollars,*] as stated and set forth in said affidavit: I do therefore hereby order that it be referred to —, Esq., of —, to examine the said C. D., and take his answers on oath concerning his property, and to reduce such answers and examination to writing; and also to examine on oath such witnesses as may be offered by the respective parties, and reduce such examination to writing, and report such answers and examinations, and all his proceedings under and by virtue of this order, to me, with all convenient speed. And I do hereby appoint the said — a referee in this action for the purposes aforesaid.

And I do also further order and direct the said C. D. to appear before the said referee, at his office [*or other place*] in the city of — on the — day of —, 187—, at — o'clock in the — noon, to answer before said referee concerning his property as aforesaid; and for that purpose to appear before the said referee from time to time, as he shall direct and appoint.

And the said C. D. is hereby forbidden to transfer, dispose of, or in any manner to interfere with any property, money, things in action, or equitable interests belonging to him and not exempt from levy and sale on execution, until further order in the premises.

Dated the — day of — 187—.

[*Judge's signature.*]



## No. 237.

*Affidavit to obtain the arrest of a judgment debtor who is about to leave the state, or conceal himself.*

(See Code, § 292.)

[*As in No. 226 to (§.) If the execution has been returned, add the last paragraph in No. 226, and continue:*] That the said C. D. is about to leave this state, and go to the state of —, [or, *that deponent, on the — day of —, 18—, inquired at the said C. D.'s place of business, and was informed by a clerk of said C. D. that C. D. was about leaving this state, and was going to the state of —, or, was trying to conceal himself from his creditors.*] That the said C. D. has property which he unjustly refuses to apply upon the said judgment, viz. : [*specifying property* ;] and that he has removed and concealed the same, and is about to carry the same to the state of —. That deponent, on the — day of —, 187—, requested the said C. D. to pay said judgment, or to secure the same, upon said property, but that said C. D. refused to apply any portion of his property to the payment of said judgment.

Sworn, etc.

[*Signature.*]

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 No. 238.

*Warrant for the arrest of a judgment debtor who is about to leave the state, etc.*

[*Title of the cause.*]

The people of the state of New York, to the sheriff of the county of —, greeting :

Whereas, a judgment was duly rendered in this action, against the above defendant C. D. [*recite the judgment and execution as in No. 205 and the subsequent forms ; varying the recital according to the facts.*] And whereas, proof has been furnished to the undersigned, to his satisfaction, by the annexed affidavit of — that there is danger of the said C. D. leaving the state [or, *concealing himself*, or both.] And whereas, it appears, in like manner, to the satisfaction of the undersigned, that there is reason to believe the said C. D. has property, which he unjustly refuses to apply to such judgment,

Now therefore, we do warrant and command you that you arrest

the said C. D. and bring him before the undersigned, to be examined on oath, and proceeded with, pursuant to the provisions of section 292 of the Code of Procedure.

And have you then there this writ. Given under my hand at —, in the county of —, this — day of —, 187—.

J. C., Attorney for plaintiff.

J. P., Justice of  
supreme court.

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No. 239.

*Affidavit to procure order for the examination of a third person, as to judgment debtor's property.*

See Vol. I., p. 873 (foot-paging;) Code, § 294.

[*Title of cause.*]

County of —, A. B., being duly sworn, says he is the above named plaintiff; that judgment was recovered in this action in favor of the above named plaintiff, against the above named defendant, C. D., on the — day of —, one thousand eight hundred and seventy —, for — dollars; and that the judgment roll was filed on that day, in the office of the clerk of the [*city and*] county of —; that an execution thereon against the property of the judgment debtor has been duly issued to the sheriff of the [*city and*] county of —; [*and returned unsatisfied*]; that the judgment debtor resided in said county at the time of issuing such execution, and still so resides, and that E. F., of —, as deponent is informed and believes, has in his possession property of the judgment debtor, or [*and*] is indebted to him in an amount exceeding ten dollars, to wit, in the sum of — dollars.

Sworn, etc.

A. B.

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No. 240.

*Order for the examination of a debtor of the judgment debtor.*

It appearing to me by affidavit on behalf of the plaintiff that an execution against the property of C. D., the defendant in this action,

has been duly issued to the sheriff of the proper county upon the judgment herein, [*and returned unsatisfied,*] and that E. F., of —, has in possession property of the judgment debtor, or [*and*] is indebted to him in an amount exceeding ten dollars, to wit, in the sum of — dollars, I do hereby require the said E. F. to appear before me, at —, in —, on the — day of — [*next,*] one thousand eight hundred and seventy —, at — o'clock in the — noon, and be examined concerning the same. And the said defendant and the said E. F. are hereby severally enjoined and forbidden to pay, receive, transfer, dispose of, or in any way interfere with any property belonging to said judgment debtor, or any debt due to said judgment debtor until further order in the premises.

And I further order and require that notice of this proceeding be given to the said C. D., by the service of a copy of this order, and of the annexed affidavit upon him personally [or, upon —, *his attorney of record in this action*; or, *by mailing the same to the said C. D., at —, properly addressed, and paying the postage thereon.*]

Dated —.

J. P., Justice of supreme court.

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No. 241.

*Affidavit of service of order for examination.*

[*Title of cause.*]

— county, ss. J. C. being duly sworn, says, that [*he is the attorney for the plaintiff herein; that*] he did, on the — day of —, 18—, at —, personally serve C. D. with the annexed [*affidavit and*] order, by delivering to, and leaving with, him a true copy thereof, and at the same time and place exhibiting and showing to him the annexed originals thereof. And deponent further says, that he knew the person so served by him to be the said C. D., the person mentioned and described in the said order.

Sworn, etc.

J. C.

No. 242.

*Examination of judgment debtor, or a third person, before a judge.*

[*Title of cause.*]

Examination of the defendant, C. D., [or, of *E. F.*, an alleged debtor of the defendant, C. D.,] in proceedings supplementary to execution in this action, taken before the Hon. —, a justice of this court, on the — day of —, 187—.

The said C. D. [or, *E. F.*] being duly sworn, says, [*insert examination, or deposition.*]

[*Signature.*]

Taken, subscribed, and sworn }  
to, before me, this — day }  
of — 18—.

J. P., Justice of supreme court.

No. 243.

*Examination of judgment debtor, etc., before a referee.*

[*Title of cause.*]

Examination of the defendant, C. D. [or, of *E. F.*, an alleged debtor of the defendant C. D.,] in proceedings supplemental to execution, in this action, taken before V. W. the referee appointed by the Hon. — to take the same, on the — day of — 18—.

The said referee having administered the usual oath to the said C. D., [or, *E. F.*,] he did thereupon depose and say as follows: [*insert examination, or deposition.*]

Taken, etc.

[*Signature.*]

V. W., Referee.

(*Certificate of referee.*)

I hereby certify that the above, [*with schedule A. annexed*] is the testimony, and the whole of the testimony, of the defendant, C. D. [or, of *E. F.*] given on the examination had before me pursuant to the annexed order in supplementary proceedings, this — day of — 187—.

V. W., Referee.

No. 244.

*Indorsement of adjournments, on examination.*

187-, June ——. C. D., sworn and examined; adjourned to Tuesday, the — instant [*at the office of the plaintiff's attorney — street, — o'clock in the — noon, by consent of the defendant and his attorney.*]

[*Signature of judge or referee.*]

No. 245.

*Order that judgment debtor pay the judgment.*

[*Title of cause.*]

On reading and filing the affidavit, and order for examination of C. D. the judgment debtor, in this cause, and the order to show cause why the said C. D. should not pay to the plaintiff, or his attorney, the amount of the judgment in this action, with costs; and on hearing — attorney for the plaintiff, in support of said motion, and — in opposition thereto; it is *ordered* that the said C. D. pay to J. C., the plaintiff's attorney, the amount of the said judgment, with interest, and — dollars, costs and disbursements of these supplementary proceedings, within ten days, or, in default thereof, that an attachment issue.

Dated —.

[*Signature of judge.*]

No. 246.

*Order, for the surrender of property, etc.*

[*Title of cause.*]

On the affidavit of —, dated the — day of — 187-, and the examination of the defendant, C. D., taken before me, whereby it appears that an execution has been duly issued in this action [*and returned unsatisfied,*] and that the said C. D. has in his possession the following property, which ought to be applied to the satisfaction of the same, but which he refuses so to apply, viz. : [*describing property*],

and on motion of —, etc.; *ordered* that the said C. D. forthwith deliver the said property [or *pay the said money*] to the above named plaintiff.

Dated —.

[*Judge's signature.*]

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No. 247.

*Order that a third person deliver property or pay the debt.*

[*Title of cause.*]

On the affidavit of —, dated the — day of —, 187—, and the examination of E. F., taken before me, [or, *the Hon. —, or, —, a referee appointed for that purpose,*] whereby it appears that the said E. F. has in his possession certain property of C. D., the judgment debtor herein, to wit, [*describing it*] [or, *that the said E. F. is indebted to C. D., the judgment debtor herein, in the sum of — dollars;*] and on motion of —, for the plaintiff, and on hearing — in opposition, it is *ordered* that the said E. F. deliver [or, *pay*] to the said plaintiff the property [or, *money*] to be applied to the satisfaction of the judgment herein.

Dated —.

[*Judge's signature.*]

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No. 248.

*Order appointing receiver.*

See Vol. I., p. 878, (foot paging;) Code, § 298.

[*Title of cause.*]

The judgment debtor in the above entitled action having been examined on oath before me, [or, —, *Esq., a referee appointed for that purpose by this court, or, the Hon. —,*] in pursuance of an order heretofore made, requiring him to make discovery on oath, concerning his property, [*and such referee having made and filed his report of such examination:*] now, on motion of —, counsel for the plaintiff, the defendant, by his counsel —, consenting, [or, *approving:*] I do hereby order that —, of —, be, and he hereby is, appointed

receiver of all the debts, property, equitable interests, rights and things in action, of the said judgment debtor; that such receiver, before he enter upon the execution of his trust, execute to the clerk of this court a bond, with sufficient sureties, to be approved by me, in a penalty of — dollars, conditioned that he will faithfully discharge the duties of such trust, and file the said bond with the clerk of the county of —; and that the said receiver, on this order being filed and recorded in the office of the clerk of the said county of —, be vested with the property and effects of the judgment debtor; and that, on filing his bond, he be invested with all the other rights and powers as receiver, according to law. I do further order that the said judgment debtor deliver to the said receiver all money and other property now in his possession, except property exempt from execution [*and excepting also his earnings during the sixty days next preceding the date hereof:*] and that the sum of — dollars be allowed to the said plaintiff for costs of this proceeding, with — dollars, for his disbursements, to be paid to the plaintiff, or his attorney by such receiver, out of the funds that shall come into his hands as receiver. And the said defendant is hereby enjoined and restrained from making any disposition of, or interfering with his property, equitable interests, things in action, or any of them, except in obedience to this order, until further order in the premises.

Dated —.

[*Signature of judge.*]

*Notice by receiver, annexed to above order.*

Please take notice, that the foregoing is a copy of an order made in the above entitled action, by the Hon. —, a justice of the supreme court, pursuant to section 298 of the Code of Procedure: and that I have given the security required by said order, which has been approved by said judge; and that I claim from you, and each of you, by virtue of said appointment, all and any debts, property, equitable interests, rights, and things in action, which belonged to the above named C. D., or in which he had any interest, on the — day of —, 187—, or at any time thereafter, and an accounting for the proceeds thereof.

Dated —.

W. T., Receiver.

To G. M., and all other persons indebted to C. D., the said judgment debtor, or who have in their possession any property or equitable interests of said C. D.

H. M., Attorney for receiver.

## No. 249.

*Affidavit of non-attendance of judgment debtor.*[*Title of cause.*]

—— county, ss. ——, being duly sworn, says, that he is the attorney for the plaintiff in this action; that he did, on the —— day of —— inst., at —— o'clock in the —— noon, attend before the Hon. ——, one of the justices of this court, at chambers, [or, before ——, the referee named in the annexed order] at ——, and there remained for [*half*] an hour, prepared to take the examination of C. D., pursuant to the annexed order; that the said C. D. failed to appear before the said judge [or, *referee*] at the place aforesaid, during that time, and thus disobeyed the annexed order. And deponent further says, that, at the said time and place, he caused the said C. D. to be duly and repeatedly called, but on his failing to appear, this deponent caused his default to be duly noted by the said judge [or, *referee*.]

Sworn, etc.

[*Signature.*]

## No. 250.

*Notice of motion for an attachment against judgment debtor, for disobedience of order.*

See Vol. I., p. 883, (foot-paging.)

[*Title of cause.*]

Take notice, that upon the annexed order of the court, [or, *of the Hon. ——,*] and upon the annexed affidavit, of which a copy is herewith served upon you, I shall move the court, at a special term to be held [or, *said justice*] at ——, on the —— day of —— next, for an order directing that an attachment issue to bring you before the said court [or, *judge*] to answer for your misconduct in disobeying the annexed order, by failing to appear before the said court [or, *judge*], [or, *before ——, Esq., the referee named in the said order*] at the time and place specified in said order, as for a contempt of the said court [or, *judge*.]

Dated ——.

J. C., Attorney for plaintiff.

To ——, Defendant's attorney.



## No. 251.

*Order to show cause why judgment debtor should not be punished for disobedience of order to appear.*

[*Title of cause.*]

Upon the annexed order [*of the Hon. ———, one of the justices of the ——— court,*] and upon the annexed affidavits, copies of which are to be herewith served, let C. D., the defendant [*or, the person mentioned in said order,*] show cause before me, at [*the chambers of the supreme court*] at the ——— in the city of ———, on the ——— day of ——— inst., why he should not be punished for his misconduct in disobeying the annexed order, by failing to appear before the ——— court, [*or, me, or, before ———, Esq., the referee named in the said order,*] at the time and place specified in said order, as for a contempt of the said ——— court.

Dated ———.

[*Signature of judge.*]

## No. 252.

*Order adjudging the judgment debtor guilty of contempt, and directing punishment.*

[*Title of cause.*] (a)

C. D., the defendant [*or, the party accused*] having appeared to show cause why he should not be punished as for a contempt, pursuant to the order of the Hon. ———, dated ———, 187—, and after hearing ———, for the plaintiff, and ———, for the said C. D., I do *adjudge* that the said C. D. is guilty of a contempt, in having wilfully disobeyed the annexed order, dated ———, 187—, by failing to appear before the court, [*or, me, or ———, Esq., the referee named in the said order*] at the time and place specified in the said order, and that such misconduct tended to defeat and impair the rights and remedies of the plaintiff in this action.

And I *order and direct* that the said C. D. pay to the clerk of the ——— court, a fine of ——— dollars for the indemnity and use of the plaintiff; and that he be imprisoned in the common jail of the county of ———,

(a) Where the proceeding is against one who is not a party to the action, this order may be entitled in the name of the *People ex rel. A. B. v. The party accused.* (2 Ab. Forms, 629, note w.)

for — days. And I likewise order that he be further imprisoned in said common jail of the county of —, until he pay the said fine as aforesaid; and that a commitment issue to carry this judgment into effect.

Dated —.

[*Signature of judge.*]

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No. 253.

*Attachment against judgment debtor, or a third person for disobedience of order for attendance and examination.*

[*Title of cause.*] (b)

The people of the state of New York, to the sheriff of the county of —, greeting: Whereas, a judgment was duly rendered in this action, against the above named defendant [*recite facts as stated in Nos. 205 to 209, and 213.*] And whereas, on the — day of —, 187–, and subsequent to the issuing [*and return*] of the said execution, the Hon. —, one of the justices of our [supreme] court, being cognizant of the foregoing facts, and upon due proof thereof, did, at the instance of the said [plaintiff,] issue an order, signed by him, with his name and his said official title, in which he did order and require the said C. D., [the defendant,] to appear before him, or, *before the — court, or, before —, Esq., the referee named and appointed in said order*] at [*the chambers of the said court,*] on the — day of —, 187–, at — o'clock in the —noon, to make discovery on oath concerning his property [or, *to answer concerning his property; or, to answer concerning said property in his possession, and said debt due from him to the defendant.*]

And whereas, the said order was, on the — day of —, 187–, duly served on the said C. D., by delivering to, and leaving with, him a true copy thereof, at the same time exhibiting and showing to him the said original order, and the signature thereto.

And whereas, the said C. D. did on the said — day of — 187–, at — o'clock in the —noon, and for one [half] hour thereafter, fail to appear before the said [*Hon. —, justice of the*] supreme court, [or, *before —, Esq., the referee named and appointed in said order,*] at [*the chambers of the supreme court,*] at — o'clock in the —noon, and was guilty of a disobedience of the said order, in

(b) The proceedings should be entitled in the original action, until after the issuing of the attachment. (2 Ab. Forms, 630; *Stafford v. Brown*, 4 Paige, 360. See *People v. Craft*, 7 id.

failing to appear at the time and place in said order specified, and became liable to punishment therefor, as for a contempt of this [or, *said*] court, pursuant to section 302 of the Code of Procedure, and under the general power of said court to punish offences calculated to impair its dignity and efficiency. (\*)

Now therefore, you are commanded that you attach the said C. D., and have his body before the Hon. ———, one of the justices of our said court, at the chambers of the said court, at the city hall, in the city of ———, on the ——— day of ——— next, [or, *instant,*] at ——— o'clock in the ——— noon, to answer for his misconduct in failing as aforesaid, to appear before [*the Hon. ———, justice of*] our said court, [or, *before ———, Esq., the referee named and appointed in said order,*] at the time and place specified in said order.

And have you then and there this writ.

Witness the Hon. ———, justice of the supreme court, at the city hall, in the ——— of ———, this ——— day of ———, 187—.

By the court.

J. C., Plaintiff's attorney.

J. W. H., Clerk.

*Indorsement of the writ.*

[*Title of cause.*]

ATTACHMENT.

Returnable before Hon. ———, at his chambers, in the city hall, of the city of ———, on the ——— day of ———, 187—. Issued for not obeying a certain order in proceedings supplementary to execution, in an action in the ——— court, between A. B., plaintiff, and C. D. [*and others,*] defendants.

J. C., Attorney for plaintiff.

Allowed this ——— day of ———, 187—, and I hereby direct that said C. D. shall give bond for his appearance, to answer to the matters alleged against him in the penalty of \$——.

J. P., Justice of supreme court.

## No. 254.

*Another form of attachment for non-attendance.*

[*Title of cause.*]

The people of the state of New York, to the sheriff of the county of —, greeting:

Whereas, I, J. P., as justice of the [supreme] court, did, on the — day of —, 187—, upon the proper affidavit, make an order in a certain action in the — court, wherein A. B. was *plaintiff* and C. D. was *defendant*, whereby it was ordered that it be referred to —, Esq., to examine the defendant C. D. [or, E. F., of —,] and take his answers on oath concerning his property, and to reduce such answers and examinations to writing; and also to examine, on oath such witnesses as might be offered by the respective parties, and reduce such examinations to writing, and report such answers and examinations, and all his proceedings under and by virtue of said order, to me as such justice with all convenient speed; and whereby it was also further ordered and directed, that the said C. D. appear before the said referee at his office in the village of — on the — day of —, 187—, at — o'clock — M., to answer before said referee concerning his property as aforesaid. And whereas it appears to me, by affidavit, that a copy of the said order was duly and personally served upon said C. D. at the village of —, where he then resided and still resides, on the — day of —, 187—, and the said order and the signature of the justice granting the same thereto, were at the same time shown to the said C. D.; and whereas it further appears to me, by affidavit, that the said C. D. wholly failed to appear before the said referee at the time and place mentioned in said order, or at any other time or place, and was guilty of a disobedience of the said order, in so failing to appear at the time and place specified in said order, and became liable to punishment therefor, as for a contempt of this [or, *said*] court, pursuant to section 302 of the Code of Procedure, and under the general power of said court to punish offences calculated to impair its dignity and efficiency.

Now, therefore, we command you to attach the said C. D., of —, if he be found in your bailiwick, and bring him before me, at my chambers, in the — of — on the — day of — 187—, to answer for his alleged misconduct in not obeying the said order made by me on the — day of —, and have you then there this writ.

APPENDIX OF PRECEDENTS.

Witness, Hon. J. P., a justice of the [supreme] court, this — day of —, 187—.

J. P., Justice of [supreme] court.

J. W. H., Clerk.

[L. s.]

J. C., Attorney for plaintiff.

(Indorsement, as on No. 253.)

No. 255.

Order to file interrogatories, where the contempt is denied.

— COURT.

<p>The People of the State of New York, on the relation of A. B.,</p> <p style="text-align: center;"><i>against</i></p> <p style="text-align: center;">V. W.(c)</p>
---

The said V. W., being now in attendance, under the attachment heretofore issued in this proceeding, and denying his alleged contempt: *ordered*, that interrogatories touching the alleged contempt be filed by the relator with the clerk of this court, within two days; and that the said V. W., within two days thereafter, file his answers to the said interrogatories; and that further proceedings herein stand adjourned until the — day of — next, at — o'clock in the — noon, at [*the chambers of this court, at the city hall,*] in the — of —, until which time the said V. W. is remanded to the custody of the sheriff of — county, to be then and there produced [or, *at which time, day and place it is directed by the court that the said V. W. appear.*]

Dated —.

[*Signature of judge.*]

(c) If the proceeding is against a defendant, or other party to the record, the order may be entitled in the original action. (2 Ab. Forms, 632.)

No. 256.

*Commitment for contempt, for disobedience of order in proceedings supplementary, etc.*

See Vol. 1., p. 383, 384, [foot-paging.]

[*Title as in No. 255.*]

The people of the State of New York, to the sheriff of the county of —, greeting :

Whereas, a judgment was duly rendered, [*as in No. 253 to (\*)*]. And whereas, the said court, on complaint of the above named A. B., was satisfied, by due proof by affidavit, that the said V. W., had been guilty of the misconduct aforesaid ; and whereas, the said court did cause the said affidavits to be served on the said V. W., on the — day of — 187—, which was a reasonable time to enable the said V. W. to make his defence ; and whereas, the said court, at a special term thereof, held at — in — on the — day of — 187—, after hearing the defence of the said V. W., did, by its order then duly entered in the office of the clerk of the said court, adjudge and declare that the said V. W. had been guilty of a contempt of said court by failing to appear before the Hon. —, a justice of the said court, at the [*chambers of*] said court, at the — in the — of — on the — day of — 187—, at — o'clock in the — noon, and for one [*half*] hour thereafter, in disobedience of the order first herein before recited ; and that such misconduct did in fact impair, impede, hinder and delay the rights and remedies of A. B., the said plaintiff, in said proceeding ; and that the said V. W. thereby had become liable to punishment for such disobedience, pursuant to section 302 of the Code of Procedure ; and whereas, the said court did, at the same time, in form and manner aforesaid, order and direct that the said V. W. be punished for his said contempt, by imprisonment in the common jail of the county of — for the term of — days ; [*and that he be further imprisoned in said common jail of the county of — until he should pay the sum of — dollars, the amount of the fine imposed by said order.*]

Now therefore, you are required and commanded, and we do warrant and enjoin you, that you forthwith attach the said V. W. and commit him to the common jail of the county of — and detain him there for the term of — days, as a punishment for his said contempt of the — court [*and until he shall also pay the said-sum of — dollars.*

APPENDIX OF PRECEDENTS.

*the amount of the fine imposed by said order.* And for such arrest, imprisonment and detention this shall be your sufficient warrant.

Witness the Hon. ———, justice of the ——— court at ———, this ——— day of ———, 187—.

J. C., Attorney for relator.

[*Signature of judge.*]

*Indorsement.*

By the special order of the court.

J. W. H., Clerk.

CHAPTER III.

PROCEEDINGS UNDER JUDGMENTS AND ORDERS.

ISSUES; SETTLING; ORDER FOR TRIAL BY JURY.

No. 257.

*Notice of motion for an order settling issues for trial.*

See Vol. I., p. 316, note 6; id. 446, and note 1; id. 447, 448, and notes.

[*Title of cause.*]

Take notice, that upon the annexed affidavit and the pleadings and proceedings in this action, I shall move this court, at a special term of the —— court to be held at —— in ——, on the —— day of —— next, at the opening of the court, or as soon thereafter as counsel can be heard, for an order settling the issues in this action for trial by a jury, or for such other relief as may be just. Herewith is also served upon you a copy of the questions of fact proposed to be submitted to the jury, for trial.

Dated ——.

[*Signature.*]

[*Address.*]

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No. 258.

*Order for trial of an issue by a jury.*

At a special term, etc.

[*Title of cause.*]

This action having been brought on to be heard upon the pleadings therein [or, *on motion to set aside the judgment therein, or otherwise*] and J. C. for the plaintiff, and A. P. for the defendant, having been heard; *ordered* that the following issue between the parties be tried by a jury, at the next circuit court to be held at ——, in and for the county of ——, on the —— day of —— next, viz.: [*insert issue.*] And all further directions are reserved until after the trial of said issue.



## No. 259.

*The like—requiring the attorneys to settle the issue.*

[As in No. 258 to (\*), then add:] ordered that an issue be granted, to try the question as to the validity of said judgment; and that all further proceedings on said judgment, or upon any execution which may have been issued thereon be stayed until the further order of this court. That the attorney of the said defendant prepare the record for the trial of said issue in the county of ———, and furnish a copy thereof to the attorney for the plaintiff; that the said defendant, C. D., be the plaintiff therein; and if the said attorney for the plaintiff in this suit shall object to the form thereof, he shall signify his objection by a notice in writing to the attorney for the defendant in this suit, in ten days after said copy shall be so furnished; and in that event the issue shall be settled by a judge of this court, on notice given to the attorney for the plaintiff in this suit, within ten days thereafter. It is further ordered that said issue may be tried at the next circuit court, to be held in the county of ———, after said issue shall be made and settled. The costs to abide the event of this suit.

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 No. 260.

*Order for the trial of the issue, or specific questions of fact involved therein, by a jury.*

See Code, § 254; Vol. I, p. 455, note 4.

At a special term, etc.

[*Title of cause.*]

On reading the pleadings in this action, and affidavits [*with an order to show cause*] and ———, having been heard for the plaintiff, and ———, in opposition; on motion of the former it is ordered, pursuant to the statute in such case made and provided, that the following specific questions of fact involved in the issue in this action, be tried by a jury, at a term of this court to be held at the court house, at ———, on the ——— day of ——— next, or as soon thereafter as the same may be tried, viz.: *First.*—Whether, etc. [*state the questions.*] And it is further ordered, that either party be at liberty to give notice of such trial,

and that upon such trial, the plaintiff hold the affirmative of all the said questions of fact, except the fifth; and that the defendant hold the affirmative of the said fifth question.

J. W. H., Clerk.

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PROCEEDINGS IN THE REFEREE'S OFFICE.

No. 261.

*Referee's summons.*

See Vol. I., p. 472, and note 11.

[*Title of cause.*]

By virtue of an order of reference in this court, dated on the — day of —, 187—, I do appoint the — day of — next at — o'clock in the —noon, at [my office] in the village of —, to consider of the matters referred. At which time and place, all parties concerned are to attend.

Dated —.

W. O., Referee.

[*Address to opposite parties or their attorneys.*]

*Underwriting.* To proceed upon [*state the object of the reference.*] (\*)

I direct that the above summons be served on the defendant, or his solicitor, — days previous to the day therein appointed.

W. O., Referee.

---

No. 262.

*Notice to a party to appear before referee.*

[*Title of cause.*]

Take notice that you are required to appear, pursuant to the within order, before —, Esq., the referee therein named, at his office in —, on the — day of —, at — o'clock in the —noon, [*state object of attendance: e. g.*] to be examined under oath, concerning your property; and that you are required to produce, then and there, before said referee, the following books and papers, viz.: [*specifying them.*]

Dated —.

J. C., Plaintiff's attorney.

To C. D., defendant.

APPENDIX OF PRECEDENTS.

No. 263.

*Summons, with underwriting to produce books and papers, before referee.*

See Vol. I., p. 480, and note 17; id. 481.

[As in No. 261 to (\*), then add:] at which time and place the defendant, C. D., is required to produce before me, and deposit in my office all such deeds, books and papers as are in his custody or power relating to the matters referred to me; and particularly a certain ———, signed by ———, and dated ———, etc., [describing any particular paper which may be required.]

No. 264.

*Subpœna for attendance of witnesses before a referee, upon a reference.*

See Vol. I., p. 501; 1 Van Sant. Eq. Pr. 528.

The people, etc. [as in No. 91 to (\*)], upon a reference now pending before the said M. N., in a certain action in the said court between A. B., plaintiff, etc. [conclude as in No. 91.]

No. 265.

*Account, upon a reference to take an account.*

See Vol. I., p. 505, and note 25; id. 506, and note 26.

[Title of cause.]

Account of the [defendant, C. D.,] of his receipts and disbursements from or on behalf of the personal estate of E. F., deceased [or, an account of the copartnership firm of G. H. & Company, or otherwise.]

C. D.	Dr.		C. D.	Cr.
[Dates and amounts, with sources from which received.]		[Dates and amounts, with objects for which expended.]		

No. 266.

*Affidavit annexed to account.*

—— county, ss. C. D., being duly sworn, says, that he is the defendant named in the above account; that the same is correct according to the best of his knowledge, information and belief, both as to its debits and credits, and that he does not know of any error or omission therein, to the prejudice of any party to this action.

Sworn, etc.

C. D.

No. 267.

*Referee's advertisement for creditors to come in, etc.*

See Vol. I., p. 517.

[*Title of cause.*]

Pursuant to [*a judgment, or,*] an order of reference in this action, dated the —— day of ——, 187—, directing the undersigned, referee therein appointed to make certain inquiries (\*) the creditors of L. M., (who died in or about the month of ——, 18—,) are required to come in and prove their debts before me, as such referee, at my office, in ——, on or before the —— day of —— next, or in default thereof, they will be excluded from the benefit of the judgment in this action.

Dated ——.

W. O., Referee.

No. 268.

*Referee's advertisement for heirs or next of kin, to come in, etc.*

See Vol. I., p. 517.

[*As in No. 267 to (\*), then :*] all persons claiming to be heirs [or, *next of kin*] to ——, late of the city of R., who died at R. aforesaid, on or about the —— day of ——, 18—, are required to come in and establish their claims, before me, [*conclude as in No. 267.*]

No. 269.

*Notice of claim to surplus moneys, in a foreclosure suit.*

See Vol. I., p. 523, and note 31 ; Vol. II., p. 185, and note 31.

[*Title of cause.*]

Sir :

Take notice that the undersigned claims to be entitled to the surplus moneys, or a part thereof, arising from the sale made under the judgment in this action, on the — day of — instant. The claim of the undersigned is for — dollars, and interest thereon, from the — day of —, 18—, by virtue of a lien under a judgment against [or, *mortgage given by,*] the defendant, C. D., while the said C. D. was the owner of the equity of redemption in the mortgaged premises, and before the commencement of this action ; the whole amount of which judgment [or, *mortgage*] is still due and unpaid [*except the sum of — dollars ;* ] [or, *by virtue of his being the owner of the equity of redemption in the mortgaged premises ; or, state the claims otherwise, according to the facts ;* which lien is next in priority after the mortgage of the plaintiff in this action.

Dated —.

[*Signature.*]

To J. W. H. Esq., Clerk.

No. 270.

*Affidavit on motion for reference of claim to surplus moneys.*

[*Title of cause.*]

— county, ss. G. H., one of the defendants in this action, being duly sworn says, that this action was brought to foreclose a mortgage on the premises described therein ; that judgment has been entered, in said action, as this deponent has been informed and believes, for the foreclosure of such mortgage and a sale of the premises ; and that a sale of the mortgaged premises has been made, by the sheriff [or, *a referee :* ] that the claim of the plaintiff in this action has been paid ; and there remains a surplus of about — dollars, over and above the amount due on said mortgage, and costs of this action ; which surplus has been brought into this court, and is subject to the order thereof.

That this deponent has a claim on the said surplus moneys, amounting to — dollars; which claim consists of a judgment obtained in this court on the — day of —, 18—, against C. D., [or, *a mortgage made on the — day of —, 18—, by C. D.,*] then the owner in fee of the mortgaged premises, [or, *which claim arises by virtue of the fact that he was the owner of the equity of redemption in the mortgaged premises;*] that the amount above claimed as due to the deponent, upon the said judgment [or, *mortgage*] is justly due; and that neither he, nor any person by his order, or to his knowledge or belief, for his use, has received the amount thus claimed, or any part thereof, or any security or satisfaction whatsoever for the same, or any part thereof, other than the said judgment [or, *mortgage.*] That by the official searches for conveyances or incumbrances, made in this action, the following unsatisfied liens upon the said surplus moneys appear, viz.: [*specify liens;*] and that no other unsatisfied liens thereon are known to this deponent to exist. (*See Rule 77 as amended in 1874.*)

Sworn, etc.

G. H.

---

No. 271.

*Notice of motion for a reference as to surplus moneys.*

[*Title of cause.*]

Take notice, that upon the annexed affidavit, and the pleadings and proceedings in this action, I shall move this court, at a special term thereof to be held at —, on the — day of — next, at — o'clock in the — noon, or as soon thereafter as counsel can be heard, for an order directing that it be referred to [ —, *Esq., of —,*] a referee, to ascertain and report the amount due to G. H., or to any other person, which is a lien upon the surplus moneys, in this action, and as to the priorities of the several liens thereon; and for such other relief as may be just.

Dated —.

[*Signature.*]

[*Address, to every party who has appeared, or filed notice of claim.*]

No. 272.

*Order of reference as to surplus moneys.*

At a special term, etc.

[*Title of cause.*]

On reading and filing notice of claim, by G. H., to surplus moneys in this action, and, on motion of —, for the said G. H., and — having been heard for [or, *on reading and filing proof of due service of notice of this application on*] all the parties who have appeared, or who have served notice of claim to such moneys, in opposition; *ordered*, that it be referred to —, Esq., of —, as a referee, to ascertain and report the amount due to the said G. H., or to any other person, which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon; and that the said referee report thereon, with all convenient speed.

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No. 273.

*Summons of referee, on reference as to surplus moneys.*

[*As in No. 261, substituting the following underwriting, viz.:*] to ascertain the validity of the claim of the defendant, G. H., to the surplus moneys arising on the sale of the mortgaged premises mentioned and described in the complaint in this action, and the amount which is due to any other person, which is a lien upon such surplus moneys; and to ascertain the priorities of the several liens thereon.

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No. 274.

*Certificate of clerk, as to who have appeared and filed claims.*

[*Title of cause.*]

I, the undersigned, clerk of the county of —, do certify that the following defendants have entered appearances in this action, viz.: C. D. by —, his attorney, and E. F. by —, his attorney; and that none of the other defendants have caused their appearance

to be entered. I further certify that no notice of claim to the surplus moneys arising from the sale of the mortgaged premises in this action was annexed to the referee's report of sale filed in my office, on the ——— day of ———, 18—; and that the only claim to the surplus moneys, filed in my office, is one on the part of G. H., etc. And I further certify that no exceptions to said report have been filed.

Dated ———.

J. W. H., Clerk.

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No. 275.

*Claim of creditor, before referee, to surplus moneys.*

[*Title of cause.*]

The claim of G. H., a specialty creditor of C. D., the defendant in this suit, to the surplus moneys arising from the sale of the mortgaged premises, under the judgment in this action.

The said G. H. states, that he resides at ———, in the county of ———, and that he has a lien upon the said surplus moneys, by virtue of a judgment recovered against the mortgagor C. D., in the supreme court for the sum of ——— dollars, on the ——— day of ———, 18—, and while he, the said C. D. was the owner of the equity of redemption, in the mortgaged premises, and before the commencement of this suit, which lien is next in priority after the mortgage of the plaintiff; and the whole amount of which judgment is still due and unpaid.

He therefore claims the whole amount of said surplus moneys arising from such sale, which, after paying the amount of the plaintiff's debt and costs, amounts to the sum of ——— dollars.

Dated ———.

G. H.

To W. O., Esq., Referee.

——— county, ss. G. H., the above claimant, being duly sworn, says, that the facts set forth in the above claim are true; that the amount therein claimed as being due to him upon the judgment therein mentioned, is justly due; and that neither he, nor any person by his order, or to his knowledge or belief, for his use, has received the amount thus claimed, or any part thereof, nor any security or satisfaction whatever for the same or any part thereof, other than the said judgment.

Sworn, etc.

G. H.



## No. 276.

*Referee's report, as to surplus moneys.*[*Title of cause.*]

To the [Supreme] Court of the State of New York.

Pursuant to an order of this court made in this action, and dated the —— day of ——, 18—, referring it to me, as a referee, to ascertain [*recite order of reference,*] I, the undersigned, said referee, report: That I caused all the parties who have appeared in this action, and all persons who had filed notice of claim upon such surplus moneys, to be summoned to appear before me; as appears by the certificate of the clerk, showing what notices of claim have been filed, and by the summons and proof of service, which are annexed, and marked Schedule A. And that on the hearing, I was attended by —— for G. H., and by —— for the defendant, C. D. That the amount of such surplus moneys is —— dollars, as appears by the certificate of the treasurer of the county of ——, hereto annexed and marked Schedule B. [*set forth the claims, the evidence, or facts proved, objections made, if any, and the conclusion of the referee—thus:*] I find the foregoing facts, and from the facts so found, I report that G. H., under and by virtue of [*the sheriff's deed to him,*] is the owner of the equity of redemption of said premises, and, as such owner, he is entitled to the whole of said surplus moneys; and that there is no lien or claim thereon prior to the lien and claim of said G. H.

Dated ——.

[*Signature of referee.*]

## No. 277.

*Notice of motion for payment of surplus moneys to claimant.*[*Title of cause.*]

Sir:

Take notice that the referee's report as to the surplus moneys in this cause, with a copy of which you have heretofore been served, will be presented to this court, at a special term thereof, to be held at the court house in ——, on the —— day of —— next, at the opening of the court, or as soon thereafter as counsel can be heard, and a motion will then and there be made, for an order [*confirming said re-*

*port and,*] that the treasurer of the county of ——— pay to the defendant, G. H., or his attorney, the whole [or, ——— *dollars*] of the surplus moneys in this cause, deposited with him; and for such further or other relief as may be just, with costs.

Dated ———.

[*Signature.*].

[*Address.*]

No. 278.

*Order for payment of surplus moneys.*

At a special term, etc.

[*Title of cause.*]

On reading and filing the report of W. O., the referee herein, from which it appears that G. H. is entitled to the whole of the surplus moneys in this action, now in the hands of the treasurer of the county of —, and after hearing —, of counsel for the said G. H., it is *ordered* that the said report be, and the same hereby is, confirmed; and that the said treasurer pay to the said G. H., or his attorney, on the receipt of either, the balance of the said surplus moneys, viz.: — *dollars*, less all proper commissions and charges, and less the sum of — *dollars*, due the referee, and which said treasurer is hereby directed to pay to him. [*If the fund is more than sufficient to pay the claim, the order should be varied accordingly, and a provision made for costs, as follows:*] It is *further ordered* that the said treasurer pay to the said G. H., or his attorney, the costs of this proceeding, and disbursements, in the sum of — *dollars* [or, *to be settled by the clerk of — county, together with ten dollars costs of this motion.*]

And that the residue of said surplus moneys be paid by said county treasurer (after deducting his commissions and charges) to the defendant C. D., the said mortgagor and owner of the equity of redemption.

No. 279.

*Order of reference to take testimony.*

At a special term, etc.

[*Title of cause.*]

On reading and filing the affidavit of A. B., the plaintiff, [or, *on the petition of C. D.*; or, *on the certificate of —, the referee*] herein, dated

APPENDIX OF PRECEDENTS.

the — day of —, 18—, and on motion of — for the plaintiff, and on hearing — for the defendant [or, *and on proof of due service of notice of this motion, and no one appearing,*] in opposition, ordered, that it be referred to —, Esq., of —, to take the evidence produced by the respective parties to this action, upon the question whether, etc. [or, *to take the testimony of —, the witness named in said affidavit, or, petition, or, certificate.*] And it is further ordered that the said referee report said testimony with all convenient speed; and that either party be at liberty, on the coming in of the report, to object to the relevancy or admissibility of all or any portion of said testimony.

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No. 280.

*Notice of motion for a reference to ascertain damages sustained by reason of injunction.*

See Vol. I., p. 468, note 6.

[*Title of cause.*]

Sir :

Please take notice that on the undertaking and other proceedings in this action, I shall move the court at a special term to be held at —, on the — day of — next, at — o'clock in the — noon, or as soon thereafter as counsel can be heard, for an order (\*) directing a reference to ascertain the damages sustained by the defendant by reason of the injunction granted in this cause, on the — day of —, 18—; and for such other or further order as may be just, [and for the costs of this motion.]

Dated —.

[*Signature.*]

To —, Esq., Plaintiff's attorney.

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No. 281.

*Order of reference thereon.*

At a special term, etc.

[*Title of cause.*]

On reading and filing notice of this motion, and on motion of —, counsel for the defendant, and after hearing —, counsel for the

plaintiff; *ordered*, that it be referred to ———, Esq., of ———, to ascertain the damages sustained by the defendant by reason of the injunction granted in this cause on the ——— day of ———, 18—, and to report the same to the court; [and that ——— days' notice of the hearing be given to C. D. and E. F., the sureties named in the undertaking given on obtaining said injunction.

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No. 282.

*Notice of motion to confirm report of referee as to damages.*

[As in No. 280 to (\*), then:] to confirm the report of the referee appointed on the ——— day of ———, 18—, to ascertain the defendant's damages by reason of the injunction heretofore granted in this action, [and for judgment thereon against the sureties in the undertaking herein;] and for such other, etc.

Dated ———.

[Signature.]

[Address—to plaintiff's attorney and to sureties.]

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No. 283.

*Order confirming report of referee as to damages.*

At a special term, etc.

[Title of cause.]

On reading and filing annexed order to show cause [or, *notice of motion*,] and affidavit and certificate, and the referee's report, and the evidence on which the same was founded, and on motion of ———, for the defendants, and after hearing ———, for the plaintiff, and for ———, [the sureties,] in opposition: *ordered*, that the said report of the referee herein be, and the same hereby is, in all respects, confirmed, [except as to the item of ——— dollars, paid by the defendants, etc., and as to that item, that it be reduced to ——— dollars, and that on the defendants' consenting to such reduction, the report be confirmed,] with ——— dollars, costs of this motion.

And it is further *ordered* and *adjudged* that the said ——— [sureties,] pay to the defendants the sum of ——— dollars, being the amount

reported by the said referee [less the said reduction] and other costs and disbursements of the said reference, to be taxed by the clerk of this court, including — dollars as a trial fee to the defendants' attorneys; and that the defendants have judgment against the said —, [sureties,] accordingly. (a.)

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No. 284.

*Notice of sale of real estate, by a referee.*

See Vol. I., pp. 525, 526, 527, and notes 33 to 36.

[*Title of cause.*]

In pursuance of a judgment of the [*supreme*] court, made in the above entitled action, on the — day of —, 18—, the undersigned, a referee for that purpose duly appointed, will sell, at public auction, at the — house, in the village of —, on the — day of — next, at — o'clock in the — noon, all those — lots of ground and premises directed by said judgment to be sold, and which are described therein as follows, viz.: [*describe the property as in the judgment; each lot or parcel separately.*]

Dated —.

W. O., Referee.

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No. 285.

*Terms or conditions of sale, on a sale of real estate by a referee.*

See Vol. I., p. 527; and note 37.

[*Title of cause.*]

*Terms of sale.*

The premises described in the annexed advertisement of sale will be sold under the direction of the subscriber, referee, upon the following terms:

- 1st. Ten per cent. of the purchase money of said premises will be required to be paid to the said referee at the time and place of sale, and for which the referee's receipt will be given.

(a) See 2 Ab. Forms, 355; *Willett v. Scovil*, 4 Ab. 405; *Russell v. Elliott*, 2 Cal. 245.

- 2d. The residue of said purchase money will be required to be paid to the said referee at his office, in the ——— of ———, on the ——— day of ———, when the said referee's deed will be ready for delivery.
- 3d. The referee is not required to send any notice to the purchaser; and if the latter neglects to call, at the time and place above specified, to receive his deed, he will be charged with interest thereafter on the whole amount of his purchase, unless the referee shall deem it proper to extend the time for the completion of said purchase.
- 4th. All taxes, assessments, and other incumbrances which, at the time of sale, are liens or incumbrances upon said premises, will be allowed by the referee, out of the purchase money, provided the purchaser shall, previously to the delivery of the deed, produce to the referee proof of such liens, and duplicate receipts for the payment thereof.
- 5th. The purchaser of said premises, or any portion thereof, will, at the time and place of sale, sign a memorandum of his purchase.
- 6th. The biddings will be kept open after the property is struck down, and in case any purchaser shall fail to comply with any of the above conditions of sale, the premises so struck down to him will be again put up for sale, under the direction of said referee, under these same terms of sale, without application to the court, unless the plaintiff's attorney shall elect to make such application; and such purchaser will be held liable for any deficiency there may be between the sum for which said premises shall be struck down upon the sale, and that for which they may be purchased on the re-sale, and also any costs or expenses occurring on such re-sale.

Dated June 6th, 187—.

W. O., Referee.

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No. 286.

*Memorandum of sale.*

See Vol. I., p. 523, and note 40.

I have this 6th day of June, 187—, purchased the premises described in the above annexed printed advertisement of sale, for the sum of

— dollars; and hereby promise and agree to comply with the terms and conditions of the sale of said premises, as above mentioned and set forth.

Dated 187—.

[*Signature of purchaser.*]

June 6th, 18—, received from [*the purchaser*] the sum of — dollars, being ten per cent. on the amount bid by him for property sold by me, under the judgment in the above entitled action.

\$————

W. O., Referee.

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No. 287.

*Referee's report of sale of real estate.*

See Vol. I., p. 529.

[*Title of cause.*]

To the Supreme Court of the State of New York.

In pursuance of a judgment of this court, made in the above entitled action on the — day of —, I, W. O., the referee to whom the execution thereof was confided, do report:

That I caused notice of the time and place of sale of the premises mentioned in the said judgment, containing a brief description thereof, to be published. [*State the mode of publication, so as to show a compliance with the directions of the judgment and rules of court.*] And agreeably to said notice, I did, at the time and place specified in the notice, to wit, on the — day of —, 18—, at noon, attend at the — in the village of —, and exposed said premises for sale, by public auction, to the highest bidder.

And I further report, that the said premises were then and there fairly struck off and sold to W. S. for — dollars, he being the highest bidder therefor, and that being the highest sum bid for the same. [*Or, if there are several parcels:*] And I further report that the several lots or parcels of land so directed to be sold, as aforesaid, were put up for sale separately, and were each and every of them sold to W. S. for the following sums, respectively: [*specify the parcels and pieces;*] those sums being the highest sums bid for the said lots, respectively, and the said W. S. being the highest bidder therefor; which several sums amount, in the aggregate, to — dollars. (\*)

And I do further report that I received from the said purchaser the amounts so bid by him, as above mentioned, and that thereupon I executed, acknowledged and delivered to said purchaser the usual referee's deed for said premises; and that I have paid over and disposed of the purchase money, or proceeds of sale, as follows, viz.:

I have retained in my hands the sum of ——— dollars, being the amount of my fees and expenses on said sale.

I have paid [enumerate, in detail, the payments made in accordance with the judgment; and in case of a surplus, in a foreclosure suit, add:] And I have deposited the balance, being the sum of ——— dollars, in the hands of the county treasurer of the county of ———, to the credit of the clerk of this court, as directed by said judgment. [In case of a deficiency, in a foreclosure suit, substitute for the preceding sentence:] And I have paid to the plaintiff, through ———, Esq., his attorney, the whole of the residue, being the sum of ——— dollars. And I also report that the deficiency due to the plaintiff, from the defendant C. D., and for which the latter is personally liable, under the judgment in this action, is ——— dollars, with interest from the date of this my report.

I have taken receipts for the sums so paid, which are hereunto annexed.

The schedule hereto annexed contains a statement of the sums thus received and paid out.

[I do also report that I have let the said W. S. into the possession of said premises.]

All which is respectfully submitted.

Dated ———.

[Signature of referee.]

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No. 288.

*Referee's report of sale, where the purchaser has not completed his purchase.*

[As in No. 287 to (\*), then:] that the terms and conditions of such sales were reduced to writing, and made known to the persons attending the sale, previous to putting up said premises, and were as follows: [that the purchaser of each lot or separate parcel was to pay ten per cent. of the purchase money, down, on the day of sale, and the residue when the sale should be confirmed and the deed delivered.] And that W. S. has signed the written terms and conditions of sale above



mentioned, together with an acknowledgment that he has purchased the premises upon those terms, and he has paid to me the amount required to be paid down.

All of which is respectfully submitted.

Dated ———.

W. O., Referee.

No. 289.

*Order confirming referee's report of sale.*

At a special term, etc.

[*Title of cause.*]

On reading and filing the report of W. O., Esq., the referee appointed to sell the premises described in the complaint in this action, which report bears date the ——— day of ———, 18—, and on filing proof of service of due notice of this motion on all the parties who have appeared in this action; *ordered* that the said report be, and the same is, hereby in all respects confirmed.

No. 290.

*Affidavit for motion to compel purchaser to complete his purchase.*

See Vol. I., p. 529, note 41.

[*Title of cause.*]

——— county, ss. J. C., being duly sworn, says, that he is the plaintiff's attorney in this action; that the action was brought to [foreclose a mortgage,] and the [mortgaged] premises were offered for sale under the direction of W. O., Esq., referee, [or, *of the sheriff of the county of* ———,] whose report of sale is hereto annexed, on the ——— day of ———, 18—, under the usual terms and conditions of sale, and purchased by W. S.; that by the terms and conditions of sale, the deed was to be delivered to the purchaser, and the purchase money was to be paid to the said referee, [or, *sheriff*] on the ——— day of ———, 18—. That said purchaser declines to complete his purchase, alleging that the proceedings in this action are irregular and void in the following particulars, viz.: [*specifying objections.*]

Sworn, etc.

J. C.

No. 291.

*Notice of motion to compel purchaser to complete his purchase.*

[As in No. 31 to (\*), then add:] and requiring you to complete your purchase mentioned in said affidavit and the referee's report of sale, and pay the amount bid for the property at the sale; and for such other relief as may be just, together with the costs of this motion.

Dated ———.

J. C., Plaintiff's attorney.

To W. S. the purchaser.

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No. 292.

*Order directing purchaser to complete his purchase.*

At a special term, etc.

[Title of cause.]

On reading and filing the affidavit of J. C. and the report of W. O., Esq., the referee, and after hearing ——— for the plaintiff, and A. P. [or, and on proof of service of due notice of this motion, and no one appearing] in opposition; ordered that the motion of the plaintiff for an order directing and requiring W. S., the purchaser at the sale had under the judgment in this action, to complete his purchase and pay the amount of his bid, be and the same hereby is (\*), granted.

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No. 293.

*Order discharging purchaser.*

[As in No. 292 to (\*), then : ] denied, and that W. S. the purchaser, be discharged from his said purchase.

And it is further ordered that W. O., Esq., the referee, in this action [or, the sheriff of ——— county,] repay to said W. S. his said deposit.

And it is further ordered that the plaintiff pay to said W. S., on demand, [or, within ——— days after service of this order] [interest thereon from the time when the purchase was to have been completed, together with] his expenses of examining the title, which are hereby fixed and allowed at the sum of ——— dollars, together with ——— dollars costs of this motion.

## No. 294.

*Order setting aside sale, on the ground of surprise, mistake, or inadequacy of price.*

See Vol. I., p. 538, and note 52; id. 541, notes 54, 55.

At a special term, etc.

[*Title of cause.*]

On reading and filing affidavit of —, and the report of W. O., referee, and after hearing A. P., for the defendant, in support of a motion to set aside the sale of real estate made under the judgment in this action by said referee, on the ground of mistake, and [or,] inadequacy of price; and after hearing J. C. for the plaintiff [or, *and on proof of service of due notice of said motion, and no one appearing*] in opposition; *ordered* that said motion be, and the same hereby is, granted; and that the sale be set aside on condition that the defendant pay to W. S. the purchaser, upon demand, his costs and expenses attending the purchase, which are hereby fixed and allowed at — dollars, together with — dollars costs of this motion; [*and on the further condition that the said defendant shall file with the clerk of this court, a bond with sureties, to be approved by a judge, conditioned that upon a re-sale of said premises, at least the sum of — dollars, and the expenses of such re-sale, shall be bid by a bona fide bidder.*]

And it is further *ordered*, that if the above condition[s] be complied with, the plaintiff shall be at liberty to cause the mortgaged premises to be again exposed for sale, by the same referee, and according to the directions contained in the judgment in this action; and that the costs and expenses of the former notice and sale, on the part of the plaintiff, to be ascertained and declared by said referee, in his report of such second sale, be included in the costs of this action, and be chargeable with the other costs of this action, upon the mortgaged premises; and that a copy of this order be forthwith served on the attorney for the plaintiff, and also on the purchaser or his counsel.

## No. 295.

*Bond given in compliance with condition of order for re-sale.*

[*Title of cause.*]

Know all men by these presents, that we, — and —, of —, in the county of —, are held and firmly bound unto A. B. of —, in the sum of — dollars, etc.

Whereas, at a special term of the supreme court of the state of New York, held at —, on the — day of —, 18—, an order was duly entered in the above entitled cause, setting aside the sale under the judgment in this action, of the premises described in the complaint, and ordering a re-sale of the same, upon the defendant filing a bond, with sureties to be approved by a judge, conditioned that upon such re-sale, at least the sum of — dollars, and the expenses of such re-sale, should be bid by a *bona fide* bidder. Now the condition of this obligation is such that if, on such re-sale, there shall be a *bona fide* bid of — dollars, and in addition thereto, of a sum sufficient to pay the expenses of such re-sale; and such bidder shall then and there, if the property is struck down to him, complete his bid, as required by the terms of said re-sale, then this obligation to be void; otherwise to be and remain in full force and virtue.

In presence of —.

[*Signatures and seals.*]

[*Acknowledgment or proof.*]

I approve of the within bond and sureties.

Dated —.

J. P., Justice supreme court.

## No. 296.

*Referee's deed, on sale of land under a judgment.*

See Vol. I., p. 531, note 44.

This indenture, made the — day of —, 18—, between W. O., referee, duly appointed in a certain action pending in the supreme court of the state of New York, between A. B., plaintiff, and C. D. defendant, of the first part, and J. W. of —, of the second part:

Whereas, at a special term of the said supreme court, held at —,

on the — day of —, 18—, it was, among other things, adjudged that the [mortgaged] premises described in the complaint in said action, or so much thereof as might be sufficient to raise the amount reported due to the plaintiff, for principal, interest and costs, and which might be sold separately, without material injury to the parties interested, be sold at public auction, by or under the direction of the said W. O., who was thereby appointed referee for that purpose [or, *who had previously been appointed referee in said action,*] that the said referee should give public notice of the time and place of such sale, according to law, and the practice of said court; that the plaintiff or any other party to the said action might become a purchaser on such sale; that the said referee execute to the purchaser or purchasers, a deed or deeds of the premises sold. And whereas, the said W. O., as such referee, and party hereto of the first part, did, in pursuance of said judgment, on the — day of —, 18—, sell at public auction, at —, in the county of —, where the same were situated, the said [mortgaged] premises, hereinafter particularly described, having first given the previous notice of the time and place of said sale, with a brief description of said premises, as required by said judgment; at which sale the said premises were struck off to the said W. S., the party hereto of the second part, for the sum of — dollars, that being the highest sum bid for the same.

Now, therefore, this indenture witnesseth that the said W. O., referee as aforesaid, and the party hereto of the first part, in order to carry into effect the sale so made by him, as aforesaid, in pursuance of the said judgment, and by virtue of the statute in such case made and provided, and in consideration of the premises, and of the sum of — dollars, paid by the said party of the second part, to the said referee, the receipt whereof is hereby acknowledged, hath granted, bargained and sold, aliened, released, conveyed and confirmed, and by these presents doth grant, bargain and sell, alien, release, convey and confirm unto the said party of the second part, and to his heirs and assigns forever, all that certain piece or parced of land [*insert description,*] together with all and singular the rights, titles, members, privileges, hereditaments and appurtenances to the same belonging, or in any wise appertaining. To have and to hold the said premises above described, and hereby intended to be granted and conveyed unto the said party of the second part, his heirs and assigns, to his and their only proper use, benefit and behoof, forever.

In witness whereof, the said party of the first part, referee as afore-

said, has hereunto set his hand and seal, the day and year first above written.

W. O., Referee. [L. s.]

Sealed and delivered }  
in presence of }

S. C.

[*Acknowledgment.*]

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No. 297.

*Affidavit on application for writ of assistance, in a foreclosure suit.*

[*Title of cause.*]

— county, ss. W. S., being duly sworn, says: that this action was brought for the foreclosure of a mortgage upon certain land situate in the county of —, and which is fully described in the judgment in this action, hereto annexed. That by said judgment, which was recovered on the — day of —, 18—, it is adjudged, among other things, that said land be sold, by W. O., Esq., referee, [or, *by the sheriff of said county of —,*] and that the purchaser at the sale be let into possession; and that any of the parties, etc., [*following the terms of the judgment as to delivery of possession.*]

That on the — day of —, 18—, after due notice said premises were duly sold by the said referee [or, *sheriff,*] and were purchased by this deponent, who, within the time required, duly paid the amount bid by him therefor, and, on the — day of —, 18—, received from said referee [or, *sheriff*] a deed of the premises, as more fully appears from the report [or, *certificate*] of sale, and order confirming the same, and also said deed [*certified copies of*] which, respectively, are hereunto annexed.

That on, and before, the delivery of said deed, the defendant, E. F. was in possession of said premises [*and so continued until the — day of —, 18—, and ever since,*] on which last-mentioned day this deponent went upon said premises, and, after exhibiting to said E. F. the annexed certified copies of said report [or, *certificate*] and order of confirmation, and said deed, duly and personally demanded of said E. F., the possession of said premises; but that he refused and still refuses, to surrender the same or any part thereof.

Sworn, etc.

W. S.

No. 298.

*Writ of assistance, in a foreclosure suit, to put purchaser in possession.*

See Vol. I., p. 531, and note 46.

[SEAL.] The People of the State of New York, to the sheriff of the county of —, greeting :

Whereas, on the — day of —, 18—, by a judgment rendered in our [supreme] court, in an action then depending in said court, wherein A. B. was plaintiff, and C. D. and G. H. were defendants, it was, among other things, adjudged that all and singular the mortgaged premises mentioned in the complaint therein [or, so much thereof as might be sufficient to raise the amount due to the said plaintiff for the principal, interest and costs in said action, and which might be sold separately without material injury to the parties interested,] be sold at public auction, by, or under the direction of W. O., Esq., a referee duly appointed for that purpose [or, *by the sheriff of the county of —,*] and also that the purchaser [*insert the words of the judgment, as to giving possession.*]

And, whereas, the said referee [or, *sheriff*] has duly filed his report of said sale, and the same has been duly confirmed by an order of said court; from which report it appears that the premises hereinafter described were sold to W. S., and that the referee's [or, *sheriff's*] deed has been executed and acknowledged, and delivered to the said W. S., purchaser as aforesaid; and that the said W. S. has not been let into, nor taken possession of the said premises, according to the tenor of said judgment; notwithstanding the said W. S. has served on the said G. H., who is in possession of said premises, a certified copy of said order confirming the report of sale, and has also produced and shown to the said G. H., the said deed of the premises, executed in pursuance of the said judgment.

Therefore we command you, that you forthwith enter upon the said premises, and eject and remove therefrom the said G. H., and any of the other parties defendant in this action who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this action, has come into the possession of said premises, or any part thereof, under him or them, and detains the same, or any part thereof, against the said W. S.; and that you put the said W. S., or his assigns, in the full, peaceable and quiet possession of the said premises without delay; and him, the said W. S., in such posses-

sion thereof, from time to time maintain, keep and defend, or cause to be kept, maintained and defended, according to the tenor and true intent of said judgment. The said premises are described as follows, viz. : [*insert description.*]

Witness J. P., one of the justices of our said [supreme] court, at — this — day of —, 18—.

J. C., Plaintiff's attorney.

J. W. H., Clerk.

---

No. 299.

*Order confirming report of referee.*

See Vol. I., p. 550, and note 61.

At a special term, etc.

[*Title of cause.*]

On reading and filing the report of —, a referee appointed by the court, on the — day of —, 18—, to inquire and report [*state the nature of the reference,*] and on motion of —, counsel for the plaintiff, and after hearing —, counsel for the defendant: *ordered* that the said report be confirmed; and that [*insert the directions consequent upon, and necessary to carry into effect, the report.*]

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No. 300.

*Notice of argument of exceptions to report of referee.*

See Vol. I., p. 554, and note 65.

[*Title of cause.*]

Please take notice that the exceptions taken to the report of the referee in this cause will be brought on for argument before this court at the next special term thereof, to be held at the court house in the village of —, on the — of —, 18—, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Dated the — day of — 18—.

Yours, etc.,

J. C., Attorney for plaintiff.

To A. P., Esq., Attorney for defendant.



CHAPTER IV.

FURTHER DIRECTIONS.

No. 301.

*Notice of hearing for further directions, upon referee's general report, and exceptions thereto.*

See Vol. I., p. 554, note 65.

[*Title of cause.*]

Please take notice that this cause will be brought to a hearing, for further directions, upon the general report of the referee and the exceptions taken thereto, before this court, at the next special term thereof, to be held at the —, in the — of —, on the — day of — next, at the opening of the court, or as soon thereafter as counsel can be heard, and an application for final judgment will then and there be made.

Dated —.

[*Signature.*]

[*Address.*]

## BOOK III.

### INTERLOCUTORY APPLICATIONS, AND OTHER INCIDENTAL PROCEEDINGS IN A CAUSE.

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#### CHAPTER I.

##### MOTIONS.

No. 302.

*Notice of motion—general form.*

See Vol. I., p. 568, and note 5; id. 569, 570, and notes 11, 12, 13, 14.

[*Title of cause.*]

Sir:

Please take notice that on the pleadings and proceedings in this cause [or, *on the affidavits and papers of which copies are herewith served*] the [defendant] will move, at a special term of this court, to be held [or, *before the Hon. J. P., a justice of this court, or, C. L., county judge of — county,*] at [the court house in] —, on the — day of — next, at — o'clock in the — noon, or as soon thereafter as counsel can be heard, for an order directing (\*) that [*specify object of motion;*] and for such other and further relief as may be just, [*with costs of motion.*]

Dated —, etc.

A. P., Defendant's attorney.

To J. C., Esq., Plaintiff's attorney.

No. 303.

*Order to show cause—by the court.*

See Vol. I., p. 568, note 5.

At a special term [*as in No. 35.*]

[*Title of cause.*]

On reading and filing the affidavit of A. B., and on motion of J. C., counsel for the [plaintiff;] *ordered* that the [defendant] show cause at a special term of this court to be held at the court house [or, *city hall*, etc.,] in the city of —, on the — day of — next, at — o'clock in the — noon, why [*specify the relief sought*], with costs of motion.

It is further *ordered* that a copy of this order, and of the affidavit upon which it is granted, be served upon the attorney for the [defendant] at least [five] days before the time above specified for showing cause herein.

J. C., Attorney.

J. W. H., Clerk.

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No. 304.

*Order to show cause—by a judge.*

[*Title of cause.*]

On reading and filing the affidavit of A. B., and on motion of —, counsel for the [plaintiff;] *ordered* that the [defendant] show cause before me [or, *at a special term*, etc., *as in No. 303.*] at chambers, in the city hall, in the city of —, on the — day of — next, at — o'clock in the —noon, why [*conclude as in No. 303.*] (\*)

Dated —.

[*Signature of judge.*]

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No. 305.

*The like—with a stay of proceedings.*

See Vol. I., p. 570, and note 10.

[*As in No. 304 to (\*), then add.:*] and until the determination of this motion, let all proceedings on the part of the plaintiff be stayed, and particularly the entry of judgment, and [*specify any other proceedings sought to be stayed.*]

No. 306.

*Affidavit of service of notice of motion, or of order to show cause, on a party, personally.*

See Vol. I., p. 572, and notes 16, 17; id. 574, and note 20.

[*Title of cause.*]

— county, ss. E. F., being duly sworn, says, that on the — day of —, 18—, at —, he served the affidavit and notice of motion hereto annexed [or, *copies of which are hereto annexed,*] on G. H., (\*) known to deponent to be a defendant in this action, by delivering the same [or, *copies thereof*] to him personally, and leaving the same with him.

Sworn etc.

E. F.

No. 307.

*The like—where notice is left at residence.*

[*As in No. 306 to (\*), then add:*] by leaving said affidavit and notice of motion at his residence No. — street, in the city of —, between the hours of six in the morning and nine in the evening, to wit, at about — o'clock, with a person of suitable age and discretion, viz.: [*specifying the person.*]

Sworn etc.

E. F.

No. 308.

*Affidavit of service of notice of motion, on attorney, personally.*

[*As in No. 306 to (\*), then add:*] the attorney for the [defendant] in this action (\*), by delivering the same to him personally at his office in —, and leaving the same with him [or, *by leaving the same at the residence of the said G. H., at No. — street, in the city of —, with a person of suitable age and discretion, after having immediately previous thereto called at the office of the said G. H. at —, in order to*

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serve the same, and such office not being open, so as to admit of service there, or, *if on a clerk or person having charge of office*, say: by delivering the same to a clerk of the said G. H., at his office, or, to a person having charge of his office, at —, and leaving the same with him; the said G. H. being absent, at the time. Or, *if left in the office*, say: by leaving the same in a conspicuous place in the office of the said G. H., at —, between the hours of six in the morning and nine in the evening, to wit, at or about the hour of — o'clock in the — noon, there being no person in said office at the time.

Sworn etc.

[Signature.]

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No. 309.

*The like—of service by mail.*

See Vol. I., p. 572, and note 18.

[*As in No 308, to (\*), then add:*] by depositing the same in the post-office at —, properly enclosed in a wrapper or envelope, and directed to the said attorney at —, his place of residence, and prepaid the postage thereon.

Sworn etc.

[Signature.]

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No. 310.

*Countermand of notice of motion.*

[*Title of cause.*]

Sir:

Take notice that I hereby countermand the notice of motion in this cause for an order [*specify object of motion,*] dated —, 18—, and heretofore served on you. [And I hereby offer to pay your costs of opposing said motion.]

Dated —.

[Signature.]

[Address.]

No. 311.

*Order of reference to determine a question of fact arising upon a motion.*

See Vol I., p. 468, note 6; id. 574, note 21.

At a special term, etc.

[*Title of cause.*]

This cause coming on to be heard, upon a motion made by the [defendant] for an order to [*specify object of motion*] and it appearing to the court that it is necessary the following question of fact, viz.: [*state the question*] should be determined before the said motion can properly be disposed of, it is, on hearing counsel for the respective parties, *ordered* that it be referred to —, Esq., of —, to take the evidence which may be produced before him by the respective parties, upon that question. And it is further *ordered* that the said referee may require the parties to this action to attend before him, and to submit to an oral cross-examination, in respect to the said question of fact [or, *the facts stated in the affidavits read upon this motion*] and that the said referee report the testimony taken by him with all convenient speed; [and that either party be at liberty, on the coming in of his report, to object to the relevancy or admissibility of all, or any portion, of said testimony.]

---

No. 312.

*Affidavit of merits, in support of motion—made by defendant.*

See Vol. I., p. 602, note 6.

[*Title of cause.*]

[*Usual commencement of affidavits.*] That this defendant has fully and fairly stated the case [or, *this case*; or, *his case*; or, *the facts of this case*] to his counsel —, Esq., who resides at —, and that he has a good and substantial defence on the merits, to the action, as he is advised by his said counsel, after such statement, and verily believes.

Sworn, etc.

[*Signature.*]

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No. 313.

*The like—made by counsel.*

[*Title of cause, and usual commencement.* Add:] That this deponent is the attorney and counsel of the above named defendant [C. D.] in this action; and that from a statement of the case in said action, made to deponent by said defendant, the deponent verily believes that said defendant has a good and substantial defence, upon the merits, to the cause of action set forth in the complaint, or to some part thereof. [*Give the reason why affidavit is not made by defendant.*]

Sworn, etc.

[*Signature.*]

CHAPTER II.

PETITIONS.

No. 314.

*General form of petitions.*

See Vol. I., p. 579, note 1; id. 580, notes 5, 6.

To the Supreme Court of the State of New York,<sup>(a)</sup> [or, in case of a preliminary petition to a judge—*To the Hon. —, one of the justices of the supreme court.*]

The petition of A. B., of the city of —, respectfully shows, [*set forth the facts.*]

Your petitioner therefore prays, that by an order of this court [*state the relief asked for.*]

And that your petitioner may have such other and further [*order or*] relief as to the court may seem just.

Dated at —, this — day of —, 18—.

A. B.

A. P., Attorney for petitioner.

STATE OF NEW YORK, }  
 — county. } ss.

On this — day of —, 187—, before me, personally appeared the above named A. B., and made oath that he has read [or, *heard read*] the above petition subscribed by him, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on his information or belief; and that as to those matters he believes it to be true.

[*Signature of officer.*]

<sup>(a)</sup> If presented before suit is commenced, a petition is not to be entitled. If after suit commenced, it is to be entitled in the cause. If presented in a proceeding which is not an action, it should be entitled: "In the matter of the application of A. B." [*an infant, or other description.*]



CHAPTER III.

ORDERS.

No. 315.

*General form of an order by a court.*

See Vol. I., p. 586, and notes 7, 8, 9.

At a special [or, *general*] term of the Supreme Court, held at the court house in —, on the — day of —, 18—.

Present, Hon. J. P., Justice, [or, *T. M., A. B. & C. D.,* Justices.]

[*Title of cause.*]

On reading and filing notice of motion [or, *order to show cause, granted by this court on the — day of —, 18—,*] and (\*), the affidavit of V. W., in support of the motion, and of T. L. in opposition thereto, [and upon the pleadings and proceedings, or other papers, in the cause], and on motion of J. C. counsel for the plaintiff, after hearing, A. P., counsel for the defendant, in opposition; ordered, (†) [*set forth the relief given,*] with [ten dollars] costs of motion.

J. C. Attorney.

J. W. H., clerk.

An order made by a judge, at chambers, is in the same form as the above, with the exception that it has no caption, and that it is dated, at the foot, and signed by the judge, instead of by the clerk and attorney.

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No. 316.

*Order denying motion.*

[*As in No. 314 to (†), then add:*] that the motion to [*state object of motion*] be denied, with [ten dollars] costs [payable by the plaintiff.]

No. 317.

*Order granted by default.*

[As in No. 314 to (\*), then:] proof [or, admission] of due service of the same on the [defendant's] attorney, with the affidavits [and other papers read upon this motion, and upon the [affidavits of A. B. & E. F., and also upon the pleadings in this cause:] on motion of J. C. counsel for the [plaintiff,] no one appearing to oppose; ordered that the motion to [state object of motion] be granted.

No. 318.

*Order dismissing motion, by default.*

At a special term etc.

[Title of cause.]

On reading and filing notice of motion for an order to [state object of motion] for [or, an order to show cause returnable] this day, served by the [plaintiff's] attorney, and such motion not having been made, according to the rules of this court; on motion of A. P., counsel for the [defendant:] ordered that the said motion be, and the same hereby is, dismissed, with [ten dollars] costs, to be paid by the [plaintiff.]

A. P., Defendant's attorney.

J. W. H., Clerk.

No. 319.

*Order granting leave to renew motion.*

[As in No. 314 to (†), then:] that the [plaintiff] have leave to renew the motion for [state object of motion] made before this court [or, Hon. —, a justice of this court] on the — day of — 18—, upon the same or any other facts; on giving — days [or, the usual] notice of motion, and paying — dollars costs to [the defendant's attorney.]

J. C., Plaintiff's attorney.

J. W. H., Clerk.

No. 320.

*Notice of settlement of order.*

See Vol. I., p. 584, and note 5.

[*Title of cause.*]

Sir :

Take notice that the order, of which the within is a copy, will be presented for settlement to the Hon. —, the justice who made the same [or, *to one of the justices of this court*] at —, on the — day of —, instant, at — o'clock in the — noon.

Dated —.

J. C., Plaintiff's attorney.

To A. P., Esq., Defendant's attorney.

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No. 321.

*Notice of motion for leave to enter order nunc pro tunc.*

See Vol. I., p. 585.

[*As in No. 302 to (\*), then :*] that the order made in this cause, dated on the — day of —, 18—, which has been drawn up, but, by mistake, was omitted to be entered within the time limited therefor [by the rules of the court] may be entered *nunc pro tunc*, as of that date. [*Conclude as in No. 278.*]

---

No. 322.

*Order vacating an order, made without notice.*

See Vol. I., p. 596, and note 17.

[*Title of cause.*]

I hereby vacate and discharge the order [for *injunction*, or, *arrest*] made by me, in this action, on the — day of —, 18—.

Dated —.

[*Signature of judge.*]

No. 323.

*Order vacating an order, made on notice.*

[*Title of cause.*]

On motion of A. P., for the defendant, and after hearing J. C. for the plaintiff, [or, *on proof of service of due notice of this motion, and no one appearing,*] in opposition, *ordered*, that the order for injunction [or, *of arrest*] made by me in this action, on the — day of — last, be and the same hereby is, vacated and discharged.

Dated —.

[*Signature of judge.*]

No. 324.

*Order nisi.*

See Vol. I., p. 592.

At a special term, etc.

[*Title of cause.*]

On reading and filing the affidavit [or, *petition*] of E. F. [or, *the plaintiff,*] and on motion of J. C., counsel for the [plaintiff,] *ordered*, that [*specify the relief granted, or say, that the prayer of said petition, or, the relief asked for by the notice of this motion*] be granted, unless cause to the contrary be shown by the defendant, within — days [or, *within the time limited by the rules of the court.*]

No. 325.

*Order nisi—another form.*

At a special term, etc.

[*Title of cause.*]

On reading and filing the petition of A. B., dated —, for the appointment of a guardian *ad litem* for the infant defendant, E. F., and on motion of —, counsel for the petitioner: *ordered* that — be appointed guardian *ad litem* for the infant defendant, E. F., unless, within ten days after service of a copy of this order, upon him, he procures a guardian *ad litem* to be appointed

No. 326.

*Affidavit of service of No. 325, and of default.*

[*Title of cause.*]

— county, ss. J. K. being duly sworn, says: that he is the attorney for the plaintiff; that on the — day of —, 18—, a certified copy of the annexed order was duly served on E. F., the infant defendant therein named; [*as appears by the annexed affidavit of C. P.*;] and that although more than ten days have elapsed since the service of said order upon him, no application has been made, on his behalf, for the appointment of a guardian *ad litem*, to the best of deponent's knowledge and belief.

Sworn, etc.

J. K.

No. 327.

*Order absolute, thereon.*

[*Title of cause.*]

On reading and filing the annexed notice, proof of service, and of no application on the part of the infant defendant J. K., for the appointment of a guardian *ad litem*, and on motion of J. C., counsel for the plaintiff; *ordered* that the order of the — day of —, 18—, be made absolute; and that J. N. be, and hereby is, appointed guardian *ad litem* for the defendant E. F., and is authorized to appear and defend this suit for him as such.

No. 328.

*Precept to enforce order for interlocutory costs.*

See Vol. I., p. 593, and note 15.

[*Title of cause.*]

The People of the State of New York, to the sheriff of the county of —, greeting:

Whereas, an order was made, by the [supreme] court, in this action, requiring A. B., the [plaintiff,] to pay C. D., [the defendant,] the sum

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of — dollars, on, [or before] the — day of —, 18—, which order has been duly entered in the office of the clerk of the county of —; and which sum is unpaid, and there is now actually due on the said order, the said sum of — dollars, and interest thereon from the day above mentioned.

Now, therefore, you are hereby commanded and required to satisfy the said order out of the personal property belonging to the defendant, in your county.

Dated —.

[*Signature of attorney.*]

*Indorsement.*

[*Title of cause.*]

Levy \$— with interest from the — day of —, 18—, and return this precept, within sixty days after its receipt by you, to the office of the county clerk of — county.

J. C., Plaintiff's attorney.

To the sheriff of the county of —.

CHAPTER IV.

AFFIDAVITS.

No. 329.

*General form of an affidavit.*

See Vol. I., p. 600-605, and notes 3-10.

[*Title of cause.*]

— county, [or, *city and county of New York*] ss. E. F., of —, in said county, [*clerk in the office of the plaintiff's attorney.*] [*If there are two deponents, say: and*] G. H. of the same place, [*severally*] being duly sworn, says, [or, say, *each for himself,*] that, etc., [*state the facts.*]

Sworn to [or, *affirmed*] before }  
me, this — day of —, }  
18—.

E. F.  
G. H.

J. L., Commissioner of deeds.



No. 330.

*Affidavit of merits.*—See No. 312.



No. 331.

*Affidavit showing service to have been made by a person who has since died, or is insane.*

See Vol. I., p. 599, note 1.

[*Title of cause.*]

— county, ss. E. F., being duly sworn, says, that on the — day of —, 18—, he was present, at —, and saw G. H., of —,

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personally serve C. D., the defendant in this cause, with a [notice of motion] of which a copy is hereto annexed, by delivering the same to the said C. D., [and leaving it with him;] that the deponent has, on inquiry, been informed and believes that the said G. H. has, since the said service died [or, *become insane.*]

Sworn, etc.

E. F.

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No. 332.

*Affidavit to compel the making of an affidavit upon a motion.*

See Vol. I., p. 606, note 12.

[*Title of cause.*]

— county, ss. A. B., the [plaintiff] in this action, being duly sworn, says, that he intends to make a motion, in this court at a [special] term, for an order [*state object of motion.*] That to enable this deponent to make such motion, successfully, it is necessary for him to have the affidavit of E. F., of —, as to the facts within his knowledge, bearing upon the matters involved in such motion; and that the said E. F. is a material and necessary witness for this deponent, in support of such motion. That the said E. F. has been applied to by this deponent to make such affidavit, and refused, and still refuses to do so.

Sworn, etc.

A. B.

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No. 333.

*Order appointing referee to take affidavit or deposition.*

At a special term, etc.

[*Title of cause.*]

On reading and filing affidavit of A. B., and on motion of J. C., counsel for the plaintiff, *ordered* that —, of —, be, and he hereby is, appointed a referee to take the affidavit or deposition of E. F. of —, as to the facts within his knowledge, bearing upon a motion about to be made by the plaintiff in this action for an order, [*state object of motion,*] with power to such referee to issue a subpoena, and compel the said E. F. to attend and make an affidavit or deposition, before him.



CHAPTER V.

INJUNCTIONS.

No. 334.

*Notice of motion for injunction.*

See Vol. I., p. 623, and note 24.

[*Title of cause.*]

Take notice, that on the complaint in this action [*and on the annexed affidavit of —,]* the undersigned will move the court, at a special term to be held at —, on the — day of — next, at — o'clock in the —noon, or as soon thereafter as counsel can be heard [*or, will move, before Hon. —, at his office in —, on, etc. (as above),]* for an injunction order to restrain the defendant, his agents and servants from [*state the acts to be enjoined ;*] and for such other and further order as may be just.

Dated —.

J. C., Plaintiff's attorney.

[*Address.*]

---

No. 335.

*Order denying motion for injunction without prejudice.*

At a special term, etc.

[*Title of cause.*]

On reading the complaint in this action, and affidavit of —, and on hearing —, counsel for the plaintiff, [*and —, in opposition ;*] ordered, that the plaintiff's motion for an injunction be, and the same is hereby denied, without prejudice to the plaintiff's right to renew it, upon the same, or other papers.

No. 336.

*General form of injunction by order of a judge.*

See Vol. I, p. 620, and note 18.

[*Title of cause.*]

It satisfactorily appearing to me by the affidavit of A. B., the above named plaintiff, dated on the — day of — instant, that sufficient grounds for an order of injunction exist; I do hereby *order* that the defendant C. D. and his agents and servants refrain from (\*) [*state the acts enjoined,*] until the further order of the court; and in case of disobedience to this order, the defendant, C. D., will be liable to the punishment therefor prescribed by law.

Dated —.

A. P., Justice of supreme court.

J. C., Plaintiff's attorney.

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No. 337.

*Injunction by order of the court.*

At a special term, [*as in No. 35.*]

[*Title of cause.*]

On reading and filing the complaint in this action [*and the affidavits of E. F. and G. H., dated the — day of —, 18—,*] and on motion of —, counsel for the plaintiff; *ordered*, that the defendant C. D., his agents and servants be, and they hereby are, commanded and enjoined to refrain from (\*) [*state the acts enjoined,*] until the further order of this court.

---

No. 338.

*Order to show cause why injunction should not issue, with restraint in the meantime.*

See. Vol. I., p. 624, and note 26.

[*Title of cause.*]

On the annexed affidavit [or, *complaint verified by the affidavit of the plaintiff,*] let the defendant show cause before me: [or, *at a special term*

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of this court] at —, on the — day of — next, why an injunction should not issue, restraining him from [*state the acts to be enjoined*]; and for such further relief as may be just.

And it is further *ordered* that the said defendant, his agents and servants, be in the meantime restrained, and they are hereby forbidden to suffer or commit any of the said acts, until the further order of the — court.

Dated —.

J. P., Justice of sup. court.

[*Address.*]

---

No. 339.

*Preliminary injunction, with order to show cause why it should not be continued.*

[*Title of cause.*]

On the complaint, duly verified, in this action, and on the affidavit of —, a motion being made by J. C., counsel for the plaintiff, for a preliminary injunction against the defendant, and sufficient reason appearing why such motion should be granted; it is hereby *ordered* that, until the further order of the court the defendant desist and refrain from [*state the acts enjoined*].

And on such complaint and affidavit, let the defendant, or his attorney, show cause before this court on the — day of — instant, at — o'clock in the — noon, at —, why the foregoing order, or some order to be made, of like purport and effect, should not be continued in full force, and until the final judgment in this action; and until the foregoing order is modified, let the same be and remain in full force and effect.

Dated —.

J. P., Justice supreme court.

J. C., Plaintiff's attorney.

---

No. 340.

*Injunction granted upon order to show cause.*

[*Title of cause.*]

On the return of the order to show cause, made by me [or, *the Hon.* —,] in the above entitled action, on the — day of —, 18—, and

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returnable this day at my office in —, [or, *before the court,*] after hearing —, counsel for the plaintiff, and —, for the defendant, no sufficient cause to the contrary being shown; *ordered*, that said order to show cause be, and the same hereby is, made absolute, on the plaintiff executing and filing a written undertaking [*with — sufficient sureties*], pursuant to the statute and the practice of the court, to the effect that he will pay the said defendant such damages, not exceeding the sum of — dollars, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff is not entitled thereto. And it is further *ordered* that the said defendant, and his agents and servants, be enjoined and restrained [*state acts enjoined*], until the further order of the court. [*If made by a judge, conclude as in No. 334.*]

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No. 341.

*Perpetual injunction by final judgment.*

See Vol. I., 613, and notes 8, 9.

[*In the final judgment, insert this clause:*] And it appearing that the plaintiff is entitled to relief in respect to the matters [or, *judgment*] mentioned in the complaint, on the ground that such [*judgment*] was recovered by means of fraud on the part of the defendant; it is therefore *adjudged* that the defendants, and each of them, and their agents, be perpetually enjoined from collecting, or in any wise enforcing said [*judgment;*] and that the same be deemed, and hereby is declared, to be, void and of no effect.

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No. 342.

*The like—against waste.*

See Vol. I., p. 614, and note 8.

That the defendants, and each of them, and their agents, be perpetually enjoined from pulling down or otherwise injuring the buildings on the premises mentioned in the complaint in this cause, or any part thereof, or from committing any waste, spoil or destruction upon said

premises; which are bounded and described as follows: [*insert description,*] or, from ploughing up any of the fields forming part of the premises described in the complaint in this cause, or any part thereof, from cutting down, felling, barking or otherwise wasting or impairing any timber-trees or underwood standing and growing on the said premises, which are bounded and described as follows: [*description;*] and from committing any further or other waste or spoil, in or upon the premises.

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No. 343.

*Undertaking on injunction.*

See Vol. I., p. 622, and note 22.

[*Title of cause.*]

The above named plaintiff having applied [or, *being about to apply*] to one of the justices of this court for an injunction, in the above entitled action, (\*) restraining the defendant C. D., from, [*state the acts to be restrained*] as therein mentioned.

Now, therefore, pursuant to the statute in such case made and provided, we, the said A. B., of the village of —, in the county of —, and E. F., of the town of —, in the county of —, merchant, undertake in the sum of — hundred dollars, that the said plaintiff will pay to the defendant so enjoined, such damages not exceeding the before mentioned sum, as he may sustain by reason of the said injunction, if the court shall finally decide that the said plaintiff was not entitled thereto; such damages to be ascertained by a reference or otherwise as the court shall direct.

Dated 187—.

A. B.

Signed and delivered, in }  
presence of —. }

E. F.

County of —, ss. A. B., one of the subscribers to the above undertaking, being duly sworn, says, that he is a resident and house [or free] holder within this state, and is worth double the sum specified in said undertaking over all his debts and liabilities, and property exempt from execution.

Sworn to before me, this — }  
day of —, 187—.

A. B.

County of —, ss. E. F., one of the subscribers to the above undertaking, being duly sworn, says, that he is a resident and house [or free] holder within this state, and is worth double the sum specified in said undertaking, over all his debts and liabilities, and property exempt from execution.

Sworn to before me, this — }  
 day of —, 187-. } E. F.

(*Acknowledgment.*)

STATE OF NEW YORK, }  
 ——— county. } ss.

On this — day of —, in the year one thousand eight hundred and — before me, the subscriber, appeared A. B. to me personally known to be the same person described in and who executed the within instrument, and acknowledged that he executed the same.

[*Signature.*]

(*Proof by witness.*)

[*Venue.*]

On this — day of —, 18—, before me came — of —, the subscribing witness to the above [or, *within*] undertaking, to me well known, who being by me duly sworn did depose and say that he resides at —; that he knew A. B. & E. F., the persons described in and who executed the said undertaking; that he saw them severally execute [or, *that they severally acknowledged they executed*] the same; whereupon he subscribed his name as a witness thereto.

[*Signature.*]

(*Approval of Judge.*)

I approve of the within undertaking, as to its form and manner of execution, and the sufficiency of the surety [or, *sureties*] therein named.

Dated —.

[*Signature.*]

No. 344.

*Undertaking upon injunction against a corporation.*

(*As in No. 343 to (\*), then add:*) which may, among other things, suspend the general and ordinary business of the defendant the — company, which is a corporation. Now therefore, [*conclude as in No. 343.*]

## No. 345.

*Bond on obtaining an injunction to stay proceedings at law, after verdict or judgment.*

See Vol. I., p. 627, and note 29.

Know all men by these presents, that we, A. B. of the city of —, and E. F., of the village of — in the county of —, and G. H., of —, are held and firmly bound unto C. D. of —, in the sum of — dollars, lawful money of the United States of America, to be paid to the said C. D., his executors, administrators or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the — day of —, 18—.

Whereas, the above named A. B. has applied to the [supreme] court for an injunction to stay proceedings by the said C. D. in a certain personal action pending in the said court, wherein the said C. D. is plaintiff and the said A. B. is defendant, after [verdict and before] judgment therein.

Now the condition of this obligation is such, that if the above bounden A. B. shall well and truly pay unto the said C. D., his executors, administrators and assigns all such damages and costs as may be awarded to him or them by the court, at the final hearing of the cause, [if deposit is dispensed with, add: *and shall pay the sum of — dollars (amount of deposit), whenever ordered by the said court,*] then this obligation to be void, otherwise to remain in full force and virtue.

Signed, sealed and delivered }  
in presence of }

[Signatures and seals.]

[Venue.]

E. F., a surety in the within [or, *above*, or, *annexed*] bond, being duly sworn, says; that he is a householder, resident within this state, to wit, at —, and that he is worth — dollars [*sum specified in bond*] over and above all demands against him.

Sworn to, etc.

E. F.

(Acknowledgment as in No. 343.)

No. 346.

*Notice of motion to dissolve, or modify injunction.*

See Vol. I., p. 637, and notes 37 to 44.

[*Title of cause.*]

Sir:

Take notice that on [*specify papers*], I shall move this court, at a special term to be held at —, on the — day of — next, at — o'clock in the — noon, or as soon thereafter as counsel can be heard, [or, *shall move, before the Hon. —, (the judge who granted the order) at his office in —, on the — day of — next, at — o'clock in the — noon*], that the injunction issued in this action be vacated and dissolved [or, *be modified so as to permit the defendant to, etc.*], with costs; and for such other or further relief as may be just.

Dated —.

A. P., Defendant's attorney.

To J. C., Esq., Plaintiff's attorney.

No. 347.

*Order vacating and dissolving injunction.*

At a special term, etc. [*if made by court.*]

[*Title of cause.*]

On reading and filing the answer of the defendant [and the affidavit of E. F.], and on motion of —, counsel for the defendant, and after hearing —, counsel for the plaintiff [or, *and on proof of service of notice of motion, and no one appearing,*] in opposition; ordered (\*) that the injunction granted by me [or, *by Hon. —, a justice of this court, or, county judge of — county*], on the — day of —, 18—, against the defendant C. D., be, and the same hereby is, vacated and dissolved [with — dollars, costs, to abide the event of the action.]

[*Signature of clerk, if order is made at special term; otherwise, of judge.*]



No. 348.

*The like—unless action be revived.*

[As in No. 347 to (\*), then:] That the plaintiff [or, *the legal representatives of the deceased plaintiff*] revive this action, against the [legal representatives of the] defendant, within — days; or that, in default thereof, the injunction granted in this suit by me [or, *by Hon. —, a justice of this court*] on the — day of —, 18—, against the above named C. D., be vacated and dissolved, with — dollars, costs.  
[Signature of judge or clerk.]

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No. 349.

*Notice of motion for a reference to ascertain damages occasioned by injunction.*

See Vol. I., p. 622, and note 22.

[Title of cause.]

Sir :

Take notice that on the undertaking and other proceedings in this cause, I shall move the court, at a special term to be held at —, on the — day of — next, at — o'clock in the —noon, or as soon thereafter as counsel can be heard (\*), for a reference to ascertain the damages sustained by the defendant by reason of the injunction granted in this action, on the — day of — last; and for such other or further order as may be just [and for the costs of this motion.]

Dated —.

A. P., Defendant's attorney.

To J. C., Esq., Plaintiff's attorney.

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No. 350.

*Order of reference.*

At a special term, etc.

[Title of cause.]

On reading and filing notice of this motion, the judgment entered in this cause, and a copy of the injunction issued therein on the —

day of — last, and on motion of —, counsel for the defendant, after hearing —, counsel for the plaintiff; *ordered* that it be referred to W. O., Esq. to ascertain the damages sustained by the defendant by reason of the said injunction, and to report the same to the court; [and that — days' notice of the hearing be given to E. F. and G. H., the sureties named in the undertaking given on obtaining said injunction.]

A. P., Defendant's attorney.

J. W. H., Clerk.

No. 351.

*Notice of motion to confirm report of referee.*

[*As in No. 349 to (\*)*, then *continue*.:] to confirm the report of the referee appointed on the — day of —, 18—, to ascertain the damages sustained by the defendant by reason of the injunction heretofore granted in this action [and for judgment thereon against the sureties,] and for such other, etc.

Dated —.

A. P., Defendant's attorney.

[*Address, to plaintiff's attorney and sureties.*]

No. 352.

*Order confirming report of referee, and for judgment against sureties.*

At a special term, etc.

[*Title of cause.*]

On reading and filing the annexed order to show cause [or, *notice of motion*] and affidavits and certificate, and the report of the referee heretofore appointed to ascertain the damages sustained by the defendant by reason of the injunction granted in this action, and the evidence on which the same was founded, and on motion of —, counsel for the defendant, and after hearing —, for the plaintiff, [*and for the sureties in the undertaking,*] in opposition; *ordered*, that the said report of the referee be, and the same hereby is, in all respects confirmed, and that the defendant's damages be assessed at — dollars, with — dollars, costs of this motion.

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And it is further *ordered* and *adjudged* that the said [*sureties, naming them*] pay to the defendant the sum of — dollars, being the amount reported by the referee, and other costs and disbursements of the said reference, to be taxed by the clerk of this court, including — dollars as a trial fee to the defendant's attorney; and that the defendant have judgment against the said [*sureties*] accordingly.

A. P., Defendant's attorney.

J. W. H., Clerk.

CHAPTER VI.

NE EXEATS.

No. 353.

*Affidavit to obtain ne exeat.*

See Vol. I., pp. 648, 649, 650, and notes 1, 2, 3.

[*Title of cause.*]

— county, ss. A. B., the plaintiff in the above entitled action being duly sworn, says, that C. D., the defendant herein is justly indebted to this deponent in the sum of — dollars for [*state cause of action,*] for the recovery of which deponent has commenced this suit [and served summons and complaint therein.] That the said defendant has not as yet served any answer or demurrer, nor given any notice of appearance, in this action. That being so indebted [or, *liable*] to this deponent, the said defendant has lately threatened and given out, that he will speedily leave this state, and go to the state of —. And that this deponent verily believes that if the said defendant should be suffered to leave this state, this deponent will either lose his said debt, or the same will be very much endangered, and it will be difficult, if not impossible, for deponent to recover the same.

Sworn, etc.

A. B.

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No. 354.

*Writ of ne exeat.*

The People of the State of New York, to the sheriff of the county of —.

Whereas, it appears to us in our [supreme] court, before the justices thereof, that C. D. is indebted to A. B., and that the said A. B. has

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commenced an action in our said court, against the said C. D. to recover such debt [or, that said A. B. has commenced an action in our said court, against the said C. D. for a divorce, and that said defendant has been ordered by our said court to pay — dollars a week, to the said plaintiff, as alimony, pending the action]; and that the said defendant threatens and designs to leave and depart from this state, and go to the state of —, as by affidavit made on that behalf; which tends to the great prejudice and damage of the said plaintiff.

Therefore, in order to prevent this injustice, we hereby command you that without delay you cause the said C. D. to come personally before you and give sufficient bail or security in the sum of — dollars that he will not go, nor attempt to go, into parts without this state, without leave of our said court. And in case he shall refuse to give such bail or security, then you are to commit him to the common jail of your county, there to be kept in safe custody until he shall do it of his own accord. And when you have taken such security, or made such commitment, you are forthwith to make and return a certificate thereof to our said court, together with this writ.

Witness the Hon. —, one of the justices of our [supreme] court [at chambers], this — day of —, 18—.

J. C., Plaintiff's attorney.

J. W. H., Clerk.

(Indorsement.)

By the special order of the court: hold the defendant to bail in the sum of \$—.

J. W. H., Clerk.

I allow the within writ.

Dated —.

J. P., Justice supreme court.

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No. 355.

*Bond to the sheriff, on a ne exeat.*

See Vol. I., p. 654.

Know all men, by these presents, that we, C. D., E. F. & J. K. all of the city of —, are held and firmly bound unto — sheriff of the county of —, in the sum of — dollars, to be paid to the said — or his assigns; for which payment, well and truly to be made, we bind

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ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Whereas, the above named C. D. has been arrested upon a writ of *ne exeat*, issued out of the supreme court of the state of New York, in a cause therein pending, wherein A. B. is plaintiff, and the said C. D. defendant, and is now in custody of the said sheriff, by virtue thereof. Now the condition of this obligation is such, that if the said C. D. shall not go, nor attempt to go, from this state, without leave of the said supreme court, then this obligation to be void, otherwise to remain in full force and virtue.

[Signatures and seals.]

Sealed and delivered }  
in presence of }

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No. 356.

*Affidavit to set aside ne exeat for neglect to prosecute action.*

See Vol. I., pp. 656, 657, and note 9.

[Title of cause.]

— county, ss. A. P., attorney for the defendant, being duly sworn, says: that this action was commenced by the service of a summons upon said defendant, on the — day of —, 18—; and that on the — day of said month, this deponent served upon the plaintiff's attorney a notice of retainer for the defendant in this action, and a demand of a copy of the complaint therein, as appears by said notice and demand, and proof of service annexed. That no copy of the complaint in this action has been served upon this deponent, although more than twenty days have elapsed since the service of the said demand of a copy of the complaint.

Sworn, etc.

A. B.

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No. 357.

*Order to show cause why writ should not be set aside*

[Title of cause.]

On the annexed affidavits of the defendant and of —, and on all the pleadings and proceedings herein, let the plaintiff or his attorneys

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show cause before a justice of this court, at a special term thereof, to be held at —, in —, on the — day of — next, at — o'clock in the — noon, why the writ of *ne exeat* heretofore granted in this action [or, a copy of which is annexed,] should not be set aside as void, or improvidently granted, [or, for neglect of the plaintiff to prosecute the action, or, as irregular in this—specifying irregularity ;] or why some other proper order should not be granted.

Dated —.

[Signature of judge.]

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No. 358.

*Order setting ne exeat aside.*

At a special term, etc.

[Title of cause.]

On reading and filing the affidavits of the defendant and —, and the copy of the petition of the plaintiff, and copy of the writ of *ne exeat* thereto annexed, and the order to show cause why said writ should not be set aside ; and on motion of —, counsel for the defendant, and after hearing —, of counsel for the plaintiff, in opposition ; *ordered* that the said writ of *ne exeat*, issued out of this court on the — day of —, 18—, to the sheriff of the county of —, and commanding said sheriff to cause the defendant C. D. personally to come before him and give sufficient bail or security, in the sum of — dollars, that the said C. D. will not go, nor attempt to go, into parts without the state of New York, and in default of giving such bail or security, to commit him, the said C. D., to the common jail of said county, there to be kept in safe custody until he shall do it of his own accord, etc., be set aside, vacated and discharged ; and the said C. D. is hereby discharged from the custody of said sheriff, under said writ or order.

J. W. H., Clerk.

CHAPTER VII.

RECEIVERS.

No. 359.

*Notice of motion for appointment of receiver by the court.*

See Vol. I., pp. 668, 669, and notes 15, 16.

[*Title of cause.*]

Sir :

Take notice, that upon [the affidavits of which copies are herewith served upon you, and also upon] the pleadings [or, *complaint*] in this action, a motion will be made at a special term of this court to be held at the [court house] in the village of ———, on the ——— day of ——— next, at the opening of the court on that day (\*) for an order for the appointment of a receiver of the rents and profits of the estate of the defendant [or, *of all the partnership property of the firm of C. D. & Co.*] mentioned in the complaint in this action, with the usual powers and directions (f); and for such other order or relief as may be just.

Dated ———.

J. C., Plaintiff's attorney.

To A. P., Esq., Defendant's attorney.

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No. 360.

*Order to show cause why receiver should not be appointed.*

See Vol. I., p. 669, note 16.

[*Title of cause.*]

On the [affidavits herewith served, and on the] complaint [or, *pleadings*] in this action, let the defendant show cause, on the ——— day of ——— next, at ——— o'clock in the ———noon, before this



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court, at a special term to be held at the court house, in the town of ———, on that day, or as soon thereafter as counsel can be heard, why a receiver should not be appointed [of all the partnership property of the late firm of C. D. & Company,] with the usual directions; and why such other relief should not be granted to the plaintiff as may be just, with costs.

Dated ———.

J. P., Justice of supreme court.

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No. 361.

*Order appointing a receiver.*

At a special term, etc.

[*Title of cause.*]

Upon the summons and complaint in this action, and on reading and filing the affidavit of ———, and on [*proof of service of notice of this motion and on*] motion of ———, counsel for the plaintiff, and after hearing ———, counsel for the defendant [or, *no one appearing to oppose; ordered* (\*) that W. O., Esq., of ———, be, and hereby is, appointed receiver of [all the partnership property of the late firm of C. D. & Company] upon his executing, acknowledging and filing with the clerk of this court a bond, in the usual form, to the people of this state, in the penalty of ——— dollars, with two sufficient sureties, freeholders or householders of the county of ———, to be approved, as to its form and manner of execution, by a justice of this court.

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No. 362.

*Notice of motion for a reference to appoint a receiver.*

See Vol. I., p. 670, note 21.

[*As in No. 359 to* (\*)], *then continue* :] for an order that it be referred to a referee to appoint a receiver of [*as in No. 359 to* (†)], *then* :] and to take from him such security as the court shall direct; and for such other order or relief as may be just.

Dated ———.

J. C., Plaintiff's attorney.

To A. P., Esq., Defendant's attorney.

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No. 363.

*Order of reference to appoint a receiver.*

[As in No. 361 to (\*), then continue:] that it be referred to W. O., Esq., of —, to (t) appoint a receiver of [all the partnership property of the late firm of C. D. and Company ;] and that the said referee take from such receiver, security for the faithful performance of his trust, to wit, a bond in the sum of — dollars, with two or more sufficient sureties, approved by said referee, and file the same with the clerk of this court [or, of the county of —.]

And it is further ordered that upon the filing of such security, and of the said referee's report, such receiver shall be vested with the usual rights and powers of receivers under this court. [And any special powers that may be necessary.] And that thereupon, the defendant C. D. deliver to such receiver [all the partnership property of the late firm of C. D. and Co.,] upon his demand.

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No. 364.

*Summons to attend reference under No. 363.*

[Title of cause.]

To A. P., Esq., Defendant's attorney,

[or, to C. D., defendant.]

You are hereby required to attend before the undersigned, the referee appointed by the court to appoint a receiver in this action, at his office No. — — street in the city of —, on the — day of — next, at — o'clock in the — noon, when he will receive proposals for a receiver under the order of court, dated —, 18—, a copy of which has been served upon you. [If addressed to the defendant in a creditor's suit, add, when necessary :] the personal attendance of the defendant C. D. is required, for the purpose of examination.

Dated —.

W. O., Referee.

J. C., Plaintiff's attorney.

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No. 365.

*Proposal of names to referee.*

[*Title of cause.*]

For receiver of the estate [or, *partnership property*, or, *rents and profits of the estate*, or *property*] mentioned in the order of this court, dated on the — day of —, 18—, the above named plaintiff [or, defendant] proposes T. N. of No. — street, in the city of —, counsellor at law. And the said T. N. offers —, of the town of — in the county of —, and —, of the village of —, as his sureties.

Dated —.

J. C., Plaintiff's attorney.

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No. 366.

*Affidavit as to rental of real property in controversy.*

[*Title of cause.*]

— county, ss. C. D., of —, being duly sworn, says, that the lands, tenements and premises [or, *other property*,] in the pleadings in this cause mentioned, and of which a receiver is directed to be appointed, are now rented at the clear yearly rent of — dollars, exclusive of taxes and all other deductions and outgoings.

Sworn, etc.

C. D.

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No. 367.

*Referee's report of appointment of receiver.*

[*Title of cause.*]

To the Supreme Court of the State of New York.

In pursuance of an order of this court, made in the above entitled action, dated the — day of —, 18—, whereby it was referred to the undersigned to appoint a receiver of [all the partnership property of the late firm of C. D. & Co.] and to take from such receiver proper security, I, W. O., the referee named in said order, respectfully report: That I have been attended on said reference by the attorneys and

counsel of the plaintiff [or, *both*, or, *all the parties to this action*], and thereupon proceeded with the matters so referred.

That T. N., of —, was proposed on the part of the [plaintiff] as such receiver; and that no objection being made to his appointment, [and no person proposed by the defendant], and the said T. N. appearing to me to be a fit and proper person for such trust, I have appointed him receiver as aforesaid.

That the said T. N. offered as his sureties —, of —, and —, of —, and being satisfied, by their affidavits, [and other proof] that they were each of them worth the sum of — dollars, over and above all their liabilities, I approved of them as such sureties.

That the said T. N. and [sureties] thereupon jointly and severally executed a bond, in the usual form, to the people of this state, in the penalty of — dollars, conditioned for the faithful discharge by the said T. N. of his duties as receiver as aforesaid.

That I have caused the said bond, with my approval indorsed thereon, and the affidavits of justification of said sureties, to be filed with the clerk of the county of —.

All which is respectfully submitted.

Dated —.

W. O., Referee.

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No. 368.

*Notice of motion for a reference to nominate receiver.*

[As in No. 359 to (\*), then say :] for an order of reference to a referee to be appointed by the court, to nominate and report to the court a suitable person to be appointed receiver of the rents and profits of the estate of the defendant [or, *of all the partnership property of the late firm of C. D. & Co.*], and to report as to the amount of the security to be required, and the sufficiency of the sureties proposed; and for such other order, etc.

Dated —.

J. C., Plaintiff's attorney.

[Address.]

No. 369.

*Order that a receiver be appointed, and for a reference to report a suitable person, etc.*

[*Commencement and recitals as in No. 361.*] *Ordered*, that a receiver be appointed [*of all the partnership property of the late firm of C. D. & Company.*] And it is further *ordered* that it be referred to W. O., Esq., of —, to report the name of a suitable person to be appointed such receiver, and to report the names of the sureties offered by him, with the amount for which they should become liable, and their responsibility for the same.

J. W. H., Clerk.

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No. 370.

*Referee's report under No. 369.*

[*Title of cause.*]

To the Supreme Court of the State of New York.

In pursuance of an order of this court, made in the above entitled action, dated the — day of —, 18—, whereby it was referred to me to report the name of a suitable person to be appointed receiver [*of all the partnership property of the late firm of C. D. & Co.*] amount of security to be given, and the names and responsibility of the sureties, I, the referee named in the said order, respectfully report :

That I have been attended, on said reference, by the attorneys and counsel of [both, or, all,] the parties to this action, and thereupon proceeded with the matters so referred. That, in my judgment, the amount of security to be given by the receiver should be the sum of — dollars. That T. N., of —, was proposed as receiver, on the part of the plaintiff; and that J. K., of —, was proposed on the part of the defendant; and that, upon due examination, it appeared to me that the said T. N. was better fitted to execute the trust of such receivership than the said J. K.; wherefore, I recommend him as a suitable person to be appointed receiver, as aforesaid.

That the said T. N. offered, as his sureties, E. F., of —, and G. H., of —, and being satisfied by their respective affidavits [and other proof] that they were each worth the sum of — dollars, over

and above all their liabilities, I approve and recommend them as such sureties.

That the said T. N., E. F. and G. H., thereupon jointly and severally executed a bond, in the usual form, to the people of the state of New York, in the penalty of ——— dollars, conditioned for the faithful discharge by the said T. N., of his duties as such receiver; which bond appeared to me sufficient, in form and substance, and is herewith submitted.

Dated ———.

W. O., Referee.

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No. 371.

*Order confirming report made by referee, under No. 345, and appointing receiver.*

At a special term, etc.

[*Title of cause.*]

On reading and filing the report of W. O., a referee appointed by the court on the ——— day of ———, 18—, to report the name of a suitable person for receiver, in this action, and what security should be required, and on motion of J. C., counsel for the plaintiff, and after hearing A. P., counsel for the defendant: *ordered* that the said report be confirmed; and that T. N., of ———, be appointed receiver of, [*designate the property, etc.*]; and that E. F. and G. H., the sureties named in said report, be approved as sureties for the said receiver; and that the bond heretofore approved by the said referee, be filed with the clerk of the county of ———, and that the appointment of the said receiver shall date from the time of such filing of the said bond.

And it is *further ordered* that the said receiver shall be vested with the usual rights and powers, and be subject to the usual liabilities of receivers under this court. [*Add any special directions that may be necessary.*]

No. 372.

*Bond of receiver.*

See Vol. I., pp. 672, 673, and note 22.

Know all men by these presents, that we, T. N. of the city of —, and E. F. & G. H. of the same place are held and firmly bound unto the people of the state of New York in the sum of — dollars, lawful money of the United States, to be paid to the said people of the state of New York. For which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, dated the — day of —, in the year one thousand eight hundred and —

Whereas, by an order of the [supreme] court of the [state of New York] made at a special term thereof, on the — day of —, 18—, in an action wherein A. B. is plaintiff and C. D. and others are defendants, the above bounden T. N. was appointed receiver of all the partnership property of the late firm of C. D. & Co., [or, *it was referred to W. O. to appoint a receiver of, etc., and to take due security from such receiver ; and whereas the said referee has appointed the above bounden T. N. such receiver :*]

Now the condition of this obligation is such, that if the above bounden T. N. shall, according to the rules and practice of the court, duly file his inventory, and annually, or oftener, if thereunto required, duly account for what he shall receive or have in charge as receiver, in the said cause, and apply what he shall receive or have in charge, as he may, from time to time, be directed by the court ; and do and perform his office of receiver in all things according to the true intent and meaning of the aforesaid order, then this obligation to be void, otherwise to remain in full force.

Sealed and delivered }  
in presence of }

[*Signatures and seals.*]

— county, ss. E. F. & G. H. of —, being severally duly sworn, say, each for himself, that he is a freeholder [or, *householder*] in —, in the county of —, and is worth — dollars, [*amount of penalty*], over and above all his debts and liabilities.

Sworn etc.

E. F.  
G. H.

APPENDIX OF PRECEDENTS.

— county, ss. On the — day of —, 18—, before me personally appeared C. D., E. F., & G. H., known to me to be the persons described in and who executed the foregoing bond, and severally acknowledged that they executed the same.

[*Signature.*]

I approve of the within bond, as to its form and manner of execution, and as to the sufficiency of the sureties.

Dated ———.

[*Signature of officer.*]

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No. 373.

*Order of reference to appoint a receiver in a creditor's suit.*

[*Commencement and recitals as in other forms.*] Ordered, that it be referred to W. O., Esq. of —, to appoint a receiver of the estate and property real and personal, things in action, debts, equitable interests, and other effects of the said defendant C. D. and which belonged to or were held in trust for him, at the time of commencing this action, or in which he had any beneficial interest, except such property as is by law exempt from execution; and also except where such trust has been executed by, or the fund so held in trust has proceeded from, some person other than the said defendant; [*if there be property which the plaintiff seeks to subject to his execution, after removing incumbrances, add:.*] and of the property hereinafter described, and the rents, issues, income and profits thereof, to wit: [*describing property.*]

And it is *further ordered* that the said referee take from such receiver security for the faithful performance of his trust, to wit, a bond, in the sum of — dollars, with two or more sufficient sureties, to be approved by said referee, and file the same with the clerk of this court [or, *of the county of —.*]

And it is *further ordered* that, upon the filing of such security, and of the said referee's report, such receiver shall be vested with the usual rights and powers of receivers under this court. And the said defendant C. D. is hereby ordered to appear before the said referee, and assign, convey, transfer and deliver over to such receiver (\*) on oath and under the direction of the said referee, the estate, property, choses in action and effects as to which such receiver is appointed, as



aforesaid, with all vouchers and papers relating thereto; as well as, from time to time, produce such books and papers, and submit to such examination, as the said referee shall direct, in relation to the property or effects which he is directed to assign and deliver over. And also that said C. D. execute and deliver to said receiver, [under the direction of said referee,] a general assignment of such property and effects; and also [*if there be real estate sought to be reached*] execute, acknowledge and deliver to said receiver, [under the direction of said referee,] a conveyance and assignment of the real estate mentioned in said complaint, and of the rents, issues and profits thereof; and that the plaintiff be at liberty to examine witnesses, before the said referee in relation to the real estate, leasehold, chattels real and personal, and equitable interests, things in action and effects of the said defendant, C. D.; and also as to any matter charged in the said complaint and not admitted by the said defendant, on such examination, so far as necessary to carry out this order. And it is also *ordered* that the receiver, when so appointed, shall have general power and authority to sue for and collect any of the debts, demands and rents belonging to the said defendant, C. D., which may be transferred to him, and to compromise and settle such as are unsafe, or of a doubtful character. [He may also sue in the name of the debtor, where it is necessary or proper for him to do so;] but the said receiver will not, in his accounts, be allowed for the costs of any suit brought by him against an insolvent from whom he is unable to collect his costs, unless such suit is brought by order of the court, or by the consent of all persons interested in the funds in his hands.

And the tenants of such real estate of the debtor, C. D., as may also be assigned or transferred to the said receiver are to attorn to such receiver; or the receiver may, when necessary, apply for an order that any of such tenants attorn and pay rents to him. And such receiver is hereby permitted to make leases, from time to time, as may be necessary, of any such real estate, for a term not exceeding [one year.]

It is also hereby made the duty of the said receiver, without any unreasonable delay, to convert all the personal estate and effects which may be assigned or delivered over to him into money; but he is not to sell any real estate, without the special order of the court, although he may sell desperate debts and all other doubtful claims to personal property, by public auction, giving at least ten days' public notice of the time and place of such sale.

Before making such appointment, said referee shall ascertain whether a receiver be already appointed of the estate and effects of the said defendant; and if there should be, and if the referee appoints him to be the receiver in this action, also, then all the rights and powers herein provided shall attach to such present receiver.

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No. 374.

*Order of reference to effect transfer to receiver in a creditor's suit.*

At a general term, etc.

[*Title of cause.*]

The issues of fact in this case having been tried, and it having been found by the verdict [or, *the decision of the judge*] that, etc. [*stating the decision.*] [Or, *on the complaint in this action, and on reading and filing the annexed proof of service thereof, with the complaint, more than twenty days since, and that no answer or demurrer has been put in,*] and on motion of J. C., counsel for the plaintiff, and after hearing A. P., counsel for the defendant; *ordered*, that it be referred to W. O., Esq., of —, to examine the defendant and such witnesses as shall be produced before him, concerning the property and assets of said defendant, and report the same to the court without delay.

And it is *further ordered* that the said defendant C. D. appear before the said referee, and assign, convey, transfer and deliver over to the receiver appointed in this action [*continue as in No. 373, from the (\*) to the end.*]

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No. 375.

*Order of referee that defendant deliver and convey property to receiver.*

[*Title of cause.*]

It appearing, to my satisfaction, by the examination of the defendant, C. D., [*and of E. F. and G. H., witnesses produced, sworn and examined before me*] on the reference under the order appointing me referee in this action, bearing date on the — day of —, 18—, that said defendant has certain goods and chattels, as of his own property, and now in his possession, to wit, [*describing the property*]; also certain bills, notes and evidences of debt, that is to say [*specifying*

them], in his possession; also certain accounts, the books of original entries of which are in possession or under the control of the said defendant, viz.: [*describe as fully as practicable.*] I, the undersigned referee, do hereby order and direct that the said defendant do, within ——— days from the date hereof, deliver over to T. N., the receiver in this action, the said personal property, bills, notes and evidences of debt, and books of account [each of said defendants delivering to said receiver so much of said property, bills, notes, evidences of debt, and books of account as may be in his separate possession]; and also all other property (not exempt from execution), evidences of debt, books of account, etc., owned by said defendant at the time of the commencement of this action, and which are susceptible of delivery, in the possession of, or under the control of [either of] the defendant [s.]

And I further order and direct that said defendant, C. D., execute and deliver [a general assignment to said receiver, to be approved by me; and also execute, acknowledge and deliver to said receiver] under my direction a conveyance and assignment of the real estate mentioned in said complaint, and of the rents, issues and profits thereof.

Dated ———.

W. O., Referee.

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No. 376.

*General assignment of partnership assets, to receiver.*

See Vol. I., p. 671.

This indenture, made the ——— day of ———, 18—, between A. B. and C. D., heretofore partners in trade, doing business in the city of ———, under the firm name of A. B. & Co., of the first part, and T. N., of ———, receiver of the estate and effects hereinafter referred to, appointed by the [supreme] court of the state of New York, of the second part.

Whereas, in and by an order of the said court in a certain action wherein the said A. B. was plaintiff, and the said C. D. was defendant, it was ordered that it be referred, etc. [*recite order of reference;*] and whereas, the said party of the second part has been duly appointed such receiver, and has given and filed the requisite security, pursuant to the rules and practice of the said court, and to the provisions of the said order:

APPENDIX OF PRECEDENTS.

Now this indenture witnesseth, that the said parties of the first part, in obedience to the said order, and in consideration of the premises aforesaid, and of one dollar to each of them in hand paid, by the said party of the second part, at or before the execution of this indenture, the receipt whereof is hereby acknowledged, have, and each of them has, conveyed, assigned, transferred and delivered over, and by these presents do, and each of them does, convey, assign, transfer and deliver over unto the said party of the second part, (\*) under the direction of the said referee, testified by his approval indorsed hereon, all and every the stock in trade, good will, estate, real and personal, chattels-real, moneys, outstanding debts, things in action, equitable interests, property and effects whatsoever and wheresoever, of, or belonging to the said firm, or to the said parties of the first part as partners therein, or in which the said firm, or they or either of them, as such partners, had any estate, right, title or interest at the time of filing the complaint in said action, to wit, on the — day of — last, and also all deeds, writings, leases, muniments of title, books of account, papers, vouchers and other evidences whatsoever, relating or appertaining thereto; to have and to hold the same unto him, the said party of the second part, as such receiver as aforesaid, and to his successors and assigns, subject to the order, direction and control of the said supreme court, and for the better and more effectually enabling the said party of the second part, his successors and assigns, to recover and receive all or any part of the stock, estate, books, debts, property, choses in action and effects hereby conveyed, assigned and transferred, they the said A. B. and C. D. have made and appointed, and by these presents do make and appoint the said T. N., party of the second part, his successors and assigns, the attorney and attorneys of them, the said parties of the first part, in their names, or in his own name, to commence, continue, discontinue and again bring, perfect and carry out actions and suits against any persons. or estate, stock, property, book-debts, choses in action or effects.

In witness, whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

[Signatures and seals.]

Sealed and delivered, in }  
presence of —. }

(Acknowledgment or proof, as in case of a deed of land.)

I hereby approve of the within assignment.

Dated —.

W. O., Referee.

No. 377.

*Deed transferring real estate to receiver.*

This indenture, made the — day of —, 18—, between C. D., of the first part, and T. N., receiver appointed by the supreme court of the state of New York, of the second part:

Whereas, [*recitals as in No. 376.*]

Now this indenture witnesseth, that the said party of the first part, in obedience to the said order, and in consideration of the premises aforesaid, and of one dollar (\*) to him in hand paid by the said party of the second part, before the execution hereof, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, released and confirmed, and by these presents doth grant, bargain, sell, alien, release and confirm unto the said party of the second part, all and every the right, title, estate and interest of the said C. D., the party of the first part, of and in all that certain lot, [*describe the premises;*] together with the appurtenances, rents, issues and profits thereof, and all deeds, evidences, leases and papers relating or belonging thereto. To have and to hold all and every the same unto, and to the use of the said T. N., party of the second part, as such receiver, his successors and assigns.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

Sealed and delivered, in } A. B. [L.S.]  
 presence of —. }

(The usual acknowledgment or proof.)

I hereby approve of the within instrument.

Dated —. W. O., Referee.

No. 378.

*Notice of motion for instructions to receiver.*

[*Title of cause.*]

Please take notice that on the affidavit of —, [or, the certificate of the referee, of which a copy is annexed] a motion will be made, to the

court, at a special term to be held at —, on the — day of — next, at — o'clock in the — noon, or as soon thereafter as counsel can be heard, for an order directing the receiver heretofore appointed, in this action, to proceed in the further discharge of his trust by, [*specify the instructions to be given him;*] and for such other or further order as may be just, with costs of motion, to be paid out of the assets in the hands of said receiver.

Dated —.

[*Signature.*]

[*Address.*]

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No. 379.

*Notice of petition by receiver for directions, etc., for taking his accounts; and for his discharge.*

Upon the petition of which the within is a copy, and upon the statement of facts and the schedules thereto annexed, and therein referred to, I shall apply to one of the justices of this court, at —, on the — day of — next, at — o'clock in the — noon, for an order directing what course I am to take in reference to the uncollected notes and accounts, etc., in my possession; also for an order directing a reference to take my accounts as receiver, and discharging me from further liability; and also for an order determining your respective priorities, and my duties as to paying your various claims to the surplus that may remain in my hands, or out of any other moneys that I may collect.

Dated —.

T. N., Receiver.

[*Address to the attorneys of each party in interest.*]

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No. 380.

*Petition of receiver for leave to sell land.*

[*Title of cause.*]

To the Supreme Court of the State of New York.

The petition of T. N., receiver in this cause, shows: That having been appointed by order of this court on the — day of — 18—,

APPENDIX OF PRECEDENTS.

receiver of [*state of what property or estate*] your petitioner gave the requisite bond, with sureties, which was duly approved and filed, and he is now acting in the discharge of said trust. That it appears that the defendant is owner of certain real property known and described as follows: [*description of property*]; that the following incumbrances are liens upon said property, to wit: [*specify incumbrances*], that the value of said property is about —— dollars.

That your petitioner has not been able to find any goods or chattels, or choses in action of the said defendant, out of which any money can be made, by collection, suit or sale; and the said land is the only available property.

Wherefore, your petitioner prays for an order permitting him, as such receiver, to sell, at public auction, and convey, all the right, title and interest of the said C. D. of, in and to the said land; and that the said C. D. be directed to join in the deed if the purchaser shall require it; and for such other or further order as may be just.

T. N., Receiver.

[*Jurat.*]

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No. 381.

*Affidavit of receiver to his account.*

[*Title of cause.*]

—— county, ss. T. N. of ——, the receiver of the rents and profits of the estate in question in this action being duly sworn, says: That the foregoing account contains, according to the best of this deponent's knowledge and belief, a full and true account of all the rents and profits of the said estate for one year, ending on the —— day of ——, 18——, being from the foot of his former account, and of the former rents returned by his said former account to be in arrear and unreceived at the time of the making up of the same, which have been received by this deponent, or any other person by his order, or for his use [except such as may have been received since the time of making up the foregoing account, which are or will be brought into his subsequent account.]

That the several sums of money mentioned in the foregoing account to have been paid or allowed, were actually paid or allowed by this deponent for or on account of the said estate, and for the several pur-

poses therein mentioned, according to the best of his knowledge and belief.

That this deponent does not know of any error or omission in the foregoing account to the prejudice of any of the parties in this cause.

[*Jurat.*]

T. N.

No. 382.

*Notice of motion to pass receiver's account.*

*As in No. 302 to (\*), then as follows:*] that it be referred to a referee to take and state the accounts of T. N., the receiver in this action, and to ascertain and report to the court what, if any, of the property and assets in question in this action remain undisposed of; and the balance of cash remaining in his hands after making all just allowances to said receiver for the costs and expenses of said receivership, and his commissions, as well as for other payments and disbursements properly made by him, on account of said trust fund [with costs of this motion, to be paid by said receiver personally—*where the receiver is in fault.*] And for such other and further relief, etc.

Dated ———.

[*Signature.*]

[*Address.*]

No. 383.

*Order for review of appointment of receiver.*

• At a special term, etc.

[*Title of cause.*]

On reading and filing the petition of the plaintiff in this action, and affidavits in opposition, and on motion of ———, counsel for the plaintiff, after hearing ———, counsel for the defendant; *ordered* [that the order of reference to W. O. to appoint a receiver in this action dated ———, 18—, be revoked, and set aside, and] that it be referred back to W. O., Esq., [the referee heretofore appointed] to review the appointment of T. N. as receiver in this cause; and that the same may be supported or opposed by further evidence. And it is *further ordered*, that after such review, and after hearing the parties,



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the said referee proceed to appoint a receiver in this action, pursuant, in all respects, to the order of this court, dated ———, 18—, and report to this court with all convenient speed.

J. C., Plaintiff's attorney.

J. W. H., Clerk.

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No. 384.

*Notice of motion to remove receiver.*

See Vol. I., p. 674, note 25.

[*Title of cause.*]

Take notice that on the annexed affidavit, and on all the proceedings in this action, a motion will be made, at a special term of this court to be held at the court house in ———, on the ——— day of ——— next, at the opening of the court, for an order directing that T. N., the receiver heretofore appointed in this action be removed from his receivership, and that another person be appointed receiver, in his place [or, *for an order of reference to appoint a new receiver,*] and the requisite security taken; and for the costs of this motion [to be paid by the said T. N., personally.]

Dated ———.

[*Signature.*]

To J. C., Plaintiff's attorney,  
and T. N., receiver.

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No. 385.

*Order for removal of receiver.*

At a special term, etc.

[*Title of cause.*]

On reading and filing affidavits of ——— and ———, and on all the pleadings and proceedings in this action, on motion of ———, counsel for the [defendant,] after hearing ———, counsel for the [plaintiff] and for T. N., receiver; *ordered*, that T. N. of ———, be and he hereby is, removed from the office of receiver, to which he was appointed under an order of reference, [or, *of the court*] dated ———, 18—. It is *further ordered* that the said T. N. make his report, and render unto this court

a full and fair account of all the property or money which has come into his hands as receiver, and of all his proceedings as such. And that the said T. N. deliver to —, all the books, papers, money and property of every kind, real and personal, which have come into his hands as such receiver, on or before the — day of —, 18—.

[It is *further ordered* that it be referred to —, as referee to appoint a new receiver in this cause in the place of the said T. N.]

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No. 386.

*Notice of motion to discharge receiver.*

See Vol. I., p. 674, note 25.

[As in No. 302 to (\*), then:] that T. N., the receiver appointed in this action be discharged, and that on an accounting by him, and a delivery of all property and other things held by him as such receiver, to be made as the court may direct, the bond entered into by him, the said receiver and his sureties. may be vacated; and for the costs of this motion.

Dated —.

[Address.]

[Signature.]

CHAPTER VIII.

ABATEMENT AND REVIVOR.

No. 387.

*Notice of motion for order to continue action, on death or disability of plaintiff.*

See Vol. I., p. 679, and notes 11, 12, 13.

SUPREME COURT.

In the matter of the petition of A. B. and E. F., to have continued an action pending in this court between A. B., plaintiff, and C. D., defendant.

Please take notice that on the annexed petition, and on the pleadings in the action above mentioned, a motion will be made, at a special term to be held at ———, on the ——— day of ——— next, at — o'clock in the ——— noon, or as soon thereafter as counsel can be heard, for an order directing the (\*) action referred to in the annexed petition, and heretofore pending in this court between A. B., plaintiff, and C. D., defendant, to be continued by E. F. as plaintiff jointly with A. B., plaintiff above named [or. *in the name of E. F.* (describing his official or trust capacity, if any,) *as plaintiff in place of A. B., plaintiff above named,*] and granting to said E. F. leave to amend the complaint in this action, as he shall be advised; and for such other relief as may be just.

Dated ———.

[*Signature.*]

[*Address.*]

No. 388.

*Petition by receiver of assignee of plaintiff's title, to continue action in his own name.*

[*Title as in No. 387.*]

To the Supreme court of the State of New York :

The petition of A. B. and E. F. shows to the court; That on or about the — day of —, 18—, A. B., above named, commenced an action in this court against (\*) C. D. for [*state nature and object of the action :*] that issue was joined therein by the service of the defendant's answer, on the — day of —, 18—; that said action was referred, by order of this court, on the — day of —, 18—, to W. O., Esq., to hear and determine the same; that the trial thereof is now pending and undetermined before him (†); that during the pendency of said action, and on the — day of —, 18—, upon application of —, a judgment creditor of said A. B., in proceedings supplementary to execution, your petitioner E. F., was, by the order of the Hon. —, one of the justices of the supreme court, duly appointed receiver of all the property of the said A. B., [*or, that pending said action, and on the — day of —, 18—, the said A. B. duly assigned and transferred the bond and mortgage in the complaint above mentioned, for a valuable consideration, to your petitioner, the said E. F., who is now the lawful owner and holder thereof.*]

Wherefore your petitioners pray that the said E. F. may be substituted as plaintiff in said action, and that said action may be continued in his name; and for such other and further relief as may be just.

Dated —.

A. B.  
E. F.

— county, ss. E. F. being duly sworn, says, that he has read [*or, heard read*] the foregoing petition signed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

Sworn, etc.

E. F.

APPENDIX OF PRECEDENTS.

No. 389.

*Petition by husband of female plaintiff, after marriage, for continuance of action in joint names.*

[As in No. 388 to (t), then:] that pending said action, and on the — day of —, 18—, your petitioner A. B. was married to your petitioner E. F., who thereby became and now is, a necessary party plaintiff herein, as your petitioners are advised and believe.

Wherefore, your petitioners pray the order of this court directing that said action may be continued by your petitioners jointly, as plaintiffs against said C. D., and that your petitioners may have [leave to amend the complaint therein as they may be advised and] such other relief as may be just.

Dated —.

[Signature.]

(Verification as in No. 388.)

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No. 390.

*Petition by executor or administrator of deceased plaintiff.*

[Title of commencement as in No. 388.]

The petition of C. D. and E. F., executors of the last will and testament [or, administrators of the goods and chattels which were] of A. B., late of —, deceased, shows to the court:

That on or about the — day of —, 18—, A. B. commenced an action in this court against C. D. for [state nature and object of action and its present condition, as in No. 388:] that during the pendency of said action, and on or about the — day of —, 18—, the said A. B. died, having first duly made and published, his last will and testament, by which, among other things, he appointed your petitioners his executors; that your petitioners have proved said will, and letters testamentary were duly issued to them by the proper surrogate on the — day of —, 18—, and that they have undertaken the execution thereof, [or, if the application is by administrators, say, in lieu of above: that said A. B. died intestate, on or about the — day of —, 18—, and pending said action: and that letters of administration upon his estate were duly granted and issued, on the — day of — last

by the surrogate of the county of —, to your petitioners, who have duly qualified and entered upon their duties as such administrators.]

That at the death of said A. B., the said [bond and mortgage] were still owned and held by him; and the amount thereof, with the interest thereon, is still due from the said defendant; that the said [bond and mortgage] are now held by your petitioners, and form a part of the assets in their hands, belonging to the estate of the said A. B. deceased.

That your petitioners are desirous of continuing the action above referred to, as executors [or, *administrators*] of said A. B., against the said C. D.

Wherefore, your petitioners pray that said action may be so continued by them; and that your petitioners may have leave to amend the complaint therein as they may be advised, and may have such further relief as may be just.

Dated —.

[*Signatures.*]

(Verification as in No. 388.)

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No. 391.

*Petition by heirs of deceased plaintiff.*

[*Title and commencement as in No. 388.*]

The petition of G. H. and J. K., heirs-at-law of the late A. B., deceased, shows to the court: That on or about the — day of —, 18—, the said A. B. commenced an action in this court, against C. D. for, [*state nature and object of action.*] That on or about the — day of —, 18—, and while the said action was pending, the said A. B. died, intestate, leaving your petitioners, who are his only children, his heirs-at-law, and as such they inherited all his interest and estate in the lands which are the subject of said action.

That your petitioners are desirous of continuing the action above mentioned, as heirs of the said A. B., against the said C. D.

Wherefore, [*conclude as in No. 388.*]

No. 392.

*Affidavit in corroboration of petition.*

[*Title of cause or petition.*]

—— county, ss. J. C., of ——, being duly sworn, says: that he was the attorney of A. B., in his lifetime, in the action mentioned in the foregoing petition; and that the said action was commenced and issue joined therein, and was pending and undetermined at the time of the death of the said A. B., as stated in said petition; and that A. P., of ——, is the attorney of the defendant in said action.

Sworn, etc.

J. C.

---

No. 393.

*Order for continuance of suit, or substitution of plaintiffs.*

At a special term, etc.

[*Title of cause.*]

On reading and filing the petition of E. F., and affidavit of ——, dated the —— day of ——, 18—, and the pleadings in this action [and proof of due service of notice of this motion,] and on motion of ——, counsel for said E. F., assignee [or, *receiver*, or, *executor* or *administrator*, or, *heirs*] of the plaintiff A. B., [*deceased*], and after hearing ——, counsel for the defendant, [or, *no one appearing*] in opposition; ordered (\*) that the above entitled action be continued by said E. F. as such receiver [or, *executor*, etc.,] as plaintiff jointly with A. B., plaintiff above named [or, *that E. F. be substituted as plaintiff in this action in the place of A. B., plaintiff above named*;] and further, that he be allowed to amend the complaint [or, *serve a supplemental complaint*] in this action, as he shall be advised.

---

No. 394.

*Notice of motion for leave to continue action, or to serve supplemental complaint.*

[*Title of cause.*]

Take notice, that on the affidavit of which a copy is herewith served upon you, and on the pleadings in this action, a motion will be made

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by E. F., as executor of the plaintiff, herein, at a special term of this court, to be held at —, in —, on the — day of — next, at the opening of the court, for leave to continue this action [or, *to serve a supplemental complaint* ;] or for such other or further relief as may be just.

Dated —.

J. C., Attorney for executor.

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No. 395.

*Order by consent, to revive and continue in names of executors, etc.*

At a special term, etc.

[*Title of cause.*]

On reading and filing the affidavit of —, showing the death of A. B., the plaintiff in this action, and the granting of letters testamentary, upon his estate to G. H. and J. K. by the surrogate of the proper county, and on motion of —, plaintiff's attorney, the defendant's attorney consenting thereto; *ordered*, that this action be, and the same is hereby revived and continued in the names of the said G. H. and J. K. as such executors, as plaintiffs; and that the said G. H. and J. K. be, and they hereby are substituted as plaintiffs in the place and stead of the said A. B., deceased; and that such revivor and continuance be without prejudice to any of the proceedings already had in this action.

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No. 396.

*Petition by defendant to have action continued, after death of plaintiff.*

See Vol. I., p. 684, and note 14.

[*Title of cause.*]

To the Supreme Court of the State of New York.

The petition of C. D., the defendant above, named, shows to this court:

That on or about the — day of —, 18—, A. B. commenced the above action, in this court, against this defendant for [*state the nature*



APPENDIX OF PRECEDENTS.

*and object of the action, and its condition.*] That, as your petitioner is informed and believes, the said A. B. died, on or about the — day of —, 18—, having first made and published his last will and testament, in due form of law, by which, among other things, he appointed G. H. and J. K. his executors; that they have proved said will, and taken upon themselves the execution thereof; but that, to the best of your petitioner's information and belief, they have failed to make any application to this court to have the above entitled action continued in their names, as plaintiffs.

Wherefore, your petitioner prays that this action may be continued in the names of the said G. H. and J. K. as executors, or that the complaint therein be dismissed, so far as their interests are concerned, and that your petitioner may have judgment thereupon against the said G. H. and J. K., as executors as aforesaid, for the costs of such action; or for such other order as may be just.

C. D.

(Verification as in No. 388.)

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No. 397.

*Order to show cause on No. 396.*

On the within petition, let the plaintiff show cause, at a special term, to be held at —, on the — day of — next, at — o'clock in the —noon, why the action therein mentioned should not be continued in the names of G. H. and J. K., as executors, or the complaint therein be dismissed, so far as the interests of said executors are concerned, [or, *why the prayer of said petition should not be granted*] with costs.

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No. 398.

*Order upon No. 396.*

[*As in No. 393 to (\*), then continue.*] that the above entitled action be continued in the names of G. H. and J. K., as executors of A. B., plaintiff above named [or, *that the complaint in this action be dismissed, so far as the interests of G. H. and J. K., executors of A. B., the plaintiff,*

are concerned; and that the defendant have leave to enter judgment against the said executors, for the costs of this action, with — dollars costs of this motion.]

(Or, the order may be in the *alternative*—thus :) ordered that the said G. H. and J. K., executors as aforesaid, revive and continue said action, by filing and serving a supplemental complaint therein, within twenty days after service of a copy of this order; or, that in default thereof, the complaint in said action be dismissed, and the defendant have leave to enter judgment against the said executors, for the costs of this action.

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No. 399.

*Notice of motion that action shall be deemed abated, unless it be revived and continued.*

See Code, § 121.

[*Title of cause.*]

Take notice that on the affidavit of which a copy is herewith served, a motion will be made, at a special term of this court to be held at —, on the — day of — next, at the opening of the court, for an order (\*) requiring this action to be revived and continued by the executor of the plaintiff, A. B., deceased, as plaintiff therein, within a time to be fixed by the court; or that, in default thereof, the action shall be deemed abated; or for such other relief as shall be just.

Dated —.

A. P., Attorney for defendant.

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No. 400.

*Order upon No. 399.*

At a special term, etc.

[*Title of cause.*]

On reading and filing the affidavit of —, [*and proof of due service of notice of motion*] and on motion of A. P., counsel for defendant, after hearing J. C. [*or, no one appearing*] in opposition; ordered that

APPENDIX OF PRECEDENTS.

G. H., executor of the above named A. B., deceased, be at liberty to continue this action, as plaintiff therein, in the place and stead of the said A. B.; and that in the event of his failure to appear and proceed therein, as such, within — months after service of a copy of this order upon —, this action be deemed abated.

---

No. 401.

*Notice of motion by plaintiff, on death or disability of defendant.*

[*As in No. 399 to (\*), then:*] directing this action to be continued against G. H. & J. K., as executors of the last will and testament of [or, *as administrator of the estate of, or heirs of*] C. D., deceased, the defendant therein, in the place of the said C. D.; and granting leave to A. B., the plaintiff, to amend the complaint hereiu, as he shall be advised; and for such other relief as may be just.

Dated —.

[*Address.*]

J. C., Attorney for plaintiff.

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No. 402.

*Order upon No. 401.*

At a special term, etc.

[*Title of cause.*]

On reading and filing affidavit of —, [*and proof of due service of notice of motion,*] and on motion of J. C., counsel for the plaintiff, after hearing — [or, *no one appearing*] in opposition; *ordered* that the plaintiff have leave to proceed against G. H. & J. K., as the executors of [or, *as administrators of the estate of, or heirs of*] C. D., deceased, by the service of summons and complaint upon them as defendants in this action.

APPENDIX OF PRECEDENTS.

No. 403.

*Notice of motion to substitute successor in office.*

[*Title of cause.*]

Please take notice that on the affidavit [or, *certificate*] of which a copy is herewith served, a motion will be made at a special term of this court to be held at —, on the — day of — next, at the opening of the court, for an order to substitute — supervisor of the town of [or, *other official designation,*] in the place of A. B. as plaintiff [or, *defendant*] in this action; and for such other relief as may be just

Dated, —.

[*Signature.*]

[*Address.*]

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No. 404.

*Order upon No. 403.*

[*Commencement as in No. 402,*] ordered that — of —, supervisor of the town of —, be substituted as the plaintiff [or, *defendant*] in this action, in the place of —; [and the said — is hereby required to appear and answer within — days after service of a copy of this order.]



## BOOK IV.

### OF THE DIFFERENT KINDS OF BILLS (COMPLAINTS.)

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#### CHAPTER II.

##### SUPPLEMENTAL COMPLAINTS.

No. 405.

*Notice of motion for leave to file supplemental complaint.*

See Vol. II., p. 59, note 1; id. p. 73, note 9.

[*Title of cause.*]

Please take notice, that upon the affidavit [and copy of supplemental complaint] herewith served, and upon all the proceedings in this action, a motion will be made, at a special term of this court, to be held at —, on the — day of — next, for leave to the plaintiff to file and serve such supplemental complaint in this action, [or, a *supplemental complaint setting up the matters contained in the annexed affidavit*;] or for such other relief as may be just.

Dated, —.

J. C., Plaintiff's attorney.

To A. P., Esq., Defendant's attorney.

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No. 406.

*Affidavit on motion for leave to file supplemental complaint.*

[*Title of cause.*]

— county, ss. A. B., being duly sworn, says, that he is the plaintiff in this action; that said action was commenced in this court,

by the service of a summons and complaint, on the — day of —, 18—; that such action was brought to [foreclose a mortgage particularly described in said complaint;] that issue has been joined therein, and the cause is now upon the calendar of this court awaiting trial. That this deponent has read the annexed draft of the proposed supplemental complaint, and that the facts therein stated are true, to the best of his knowledge and belief. That said facts did not occur, [or, *did not come to the knowledge of this deponent, nor had he any information thereof,*] until after the service of the original complaint in this action

Sworn, etc. A. B

No. 407.

*Order granting leave to serve supplemental complaint.*

At a special term, etc.

[*Title of cause.*]

On reading and filing [*specify motion papers,*] and on motion of J. C., counsel for the plaintiff, and after hearing A. P. [or, *no one appearing*] in opposition; *ordered*, that the plaintiff have leave to serve within — days after this date, a copy of the supplemental complaint filed upon this motion, on payment to the [defendant] of — dollars, costs.

No. 408.

*Supplemental complaint in creditor's suit.*

See Vol. II., p. 70, and note 7.

[*Title of cause.*]

The plaintiffs, by way of supplement to their original complaint, and on behalf of themselves, and all other creditors of C. D. & Co., entitled under the original complaint, to come in and contribute to the expenses of this suit, complain and allege, that on the — day of —, 18—, they commenced their action in this court, against the defendants, [*naming the judgment debtors*] by the service of a summons and copy of complaint, to which complaint the plaintiffs refer, as if the

APPENDIX OF PRECEDENTS.

same were herein repeated, and as part of this supplemental complaint. That an injunction was granted in said action, pursuant to the prayer of said original complaint [*set forth the proceedings in the action, and the acts done by defendants since its commencement, which have rendered a supplemental complaint necessary.*] That to the best of their recollection and belief, the plaintiffs were ignorant of the facts stated in this supplemental complaint when the original complaint was drawn.

Wherefore, the plaintiffs demand judgment as in the original complaint demanded, [and that the said assignment be set aside; that the property assigned be delivered to a receiver, etc., and that, in the meantime, the defendants be restrained by injunction from disposing of any of the said assigned property.]



CHAPTER VIII.

BILL OF INTERPLEADER.

PROCEEDINGS FOR INTERPLEADER.

No. 409.

*Notice of motion for substitution of claimant and discharge of defendant.*

See Vol. II., p. 117, and notes 1, 2, 3.

[*Title of cause.*]

Take notice that on the affidavit herewith served, and on the complaint in this action, the defendant will move the court, at a special term to be held at —, on the — day of — next, at the opening of the court, to substitute J. M., of —, in his place as defendant in this action, and to discharge this defendant from liability to either the plaintiff or the said J. M., concerning the subject matter of this action, mentioned in the complaint therein, upon this defendant's paying into court the the sum of — dollars, the amount claimed in the summons, [or, *if the action is for specific property, say: concerning the property mentioned in the complaint, upon said defendant's transferring the same to such person as the court may direct.*] or for such other relief as may be just, [and for the costs of this motion.]

Dated —.

A. P., Defendant's attorney.

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No. 410.

*Affidavit accompanying No. 409.*

[*Title of cause.*]

— county, ss. M. N., being duly sworn, says, that he is president of the First National Bank of —, the defendant above named, a corporation duly incorporated under the laws of this state and of the

United States. That the above entitled action has been commenced, and is now actually pending in this court, against the said defendant, on a contract; and that the said defendant has not yet answered, and time to answer does not expire until the — day of — next. That said action is brought to recover the sum of — dollars, deposited with the said defendant on or about the — day of —, 18—; by one S. T., and that the plaintiff claims to be entitled to said moneys, under an assignment thereof to him made by the said S. T. That on the — day of —, 18—, one U. V. gave to said defendant notice that he had been appointed receiver of all the property of the said S. T., and demanded of said defendant that it should pay the said deposit to him, which demand was made without any collusion with the said defendant.

And this deponent further says that neither he nor the said defendant are acquainted with the respective merits of said claims, and do not know to which of said parties they can safely pay said money; but the defendant hereby offers to pay the same into court, upon being discharged from liability to either of them, in order that said several claimants may interplead, and settle their claims between themselves.

Sworn, etc.

M. N.

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No. 411.

*The like—in an action for specific property.*

[*Title of cause.*]

— county, ss. C. D., being duly sworn, says: That he is the defendant in the above entitled action. That the complaint therein was served on the — day of —, 18—, and no answer has yet been filed or served. That the property which is claimed by the plaintiff, in the complaint, was consigned to this deponent by one S. T., of —, subject to his order. That the same property is claimed by U. V., of —, under a written order of the said S. T., dated —, 18—, and directing its delivery to him as the alleged purchaser thereof; while the plaintiff in this action claims under a general assignment of all the property of the said S. T., to him, executed by the said S. T. on the same day. That this deponent is ignorant of the rights of the respective claimants, and is not acting in collusion with either of them.

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That the defendant is ready and willing to deliver the said property to such person as the court may direct, upon being discharged from liability to either of the said claimants.

Sworn, etc.

C. D.

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No. 412.

*Order for substitution of claimant and discharge of defendant.*

[Commence as in No. 35.] *Ordered*, that on payment by the defendant to the clerk of — county, of the amount claimed in the summons in this action, principal and interest, less ten dollars costs of this motion, within five days from the entry of this order, U. V. be substituted as defendant in this action, in place of the present defendant C. D.; and that the said C. D. be thereupon discharged from liability to either the plaintiff, above named, or said U. V. And it is further *ordered* that if the said U. V. does not appear to defend this action within twenty days after service upon him of a copy of this order, together with a copy of the complaint in this action, the plaintiff may apply, *ex parte*, for an order that the money so deposited be paid over to him.

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No. 413.

*The like—for delivery of specific property, and appointing receiver thereof.*

[Commence as in No. 35.] *Ordered*, that the defendant deliver the property mentioned in the complaint in this action to T. N., Esq., of —, who is hereby appointed receiver thereof. That S. T., of —, be substituted as defendant in this action, in the place of the above defendant C. D.; who shall, upon the delivery of such property to said receiver, be discharged from all liability therefor, either to the plaintiff or to the said S. T.

That the said receiver hold the said property subject to the further direction of this court.

That within — days after entry [or, *notice*] of this order, the plaintiff serve a summons, and a copy of his complaint, amended as

he may see fit [with a copy of this order] upon the said S. T. ; and that the said S. T. answer such complaint within — days thereafter.

That if the plaintiff neglect to serve his summons and complaint, and this order, as above directed, the defendant C. D. may apply to the court for an order dismissing the action, and directing that the said property be delivered by the receiver to the said defendant C. D. And if the said S. T. shall neglect to answer such complaint, if served as herein directed, the plaintiff may apply, on notice, for an order that said property be delivered by the receiver to the plaintiff.

That — dollars costs be allowed to the said C. D., to be deducted by him out of the fund [or, to be paid by the plaintiff, and allowed to him, in case of his final recovery of judgment.]

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No. 414.

*Complaint, in action for interpleader.*

See Vol. II., p. 120, and notes 10-14.

[*As in No. 1 to (\*) ; then :*] that before the making of the claims hereafter mentioned, one S. T. deposited with the plaintiff [*describe the property*] for [safe keeping.] That the defendant, C. D., claims the same [under an alleged assignment thereof to him from the said S. T.] That the defendant, E. F., also claims the same [under an order of the said S. T., transferring and directing the delivery of the same to him.] That the plaintiff is ignorant of the respective rights of the defendants. That he has no claim upon the said property, and is ready and willing to deliver it to such person or persons as the court shall direct. That this action is not brought by collusion with either of the defendants.

Wherefore, the plaintiff demands judgment :

1. That the defendants be restrained, by injunction, from taking any proceedings against the plaintiff, in relation thereto.
2. That they be required to interplead together, concerning their claims to said property.
3. [That some person be authorized by the court, to receive the said property, and to hold the same pending such litigation, subject to the order of the court.]
4. That upon delivering such property to such person the plaintiff

APPENDIX OF PRECEDENTS.

be discharged from all liability to either of the defendants, in respect thereto.

5. And that the plaintiff's costs be paid out of the proceeds of such property.

J. C., Plaintiff' attorney,  
Albany, N. Y.

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No. 415.

*Notice of motion for leave to deposit, and for an injunction upon No. 414.*

[*Title of cause.*]

Take notice, that on the complaint in this action [and on the affidavit annexed] a motion will be made, at a special term of this court to be held at the ———, in ———, on the ——— day of ——— next, at the opening of the court [or, *before the Hon. ———, a justice of this court, at his office in ———, on the ——— day of ——— next, at ——— o'clock in the ———noon*] for an order granting leave to the plaintiff to pay into court, in trust, in this cause, the sum of ——— dollars [or, *to deposit in such manner as the court shall direct, the property*] mentioned in the complaint herein; and that upon his doing so, an injunction may issue, to restrain the defendant C. D. from taking any proceedings against the plaintiff in respect to the said sum of money [or, *property*] pending the litigation respecting the same; and for such other or further order as may be just [and for the costs of this motion.]

Dated ———.

J. C., Plaintiff's attorney.

[*Address.*]

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No. 416.

*Injunction in interpleader case.*

[*As in No. 336 or 337 to (\*), then.:*] taking any proceedings against the plaintiff in respect to the sum of ——— dollars [or, *property*] mentioned in the complaint in this action, pending the litigation between the defendants respecting the same; upon the plaintiff's paying into the hands of the clerk of this court the said sum of money, [or, *depositing the said property with ———.*]

## No. 417.

*Order for judgment and reference, in interpleader case.*

[*Recitals as in other cases.*] Thereupon it is *ordered and adjudged*, that the said complaint of interpleader is properly brought by the plaintiff in this action. That the plaintiff be paid his costs of this action, to be allowed by deducting the same from the fund in the complaint mentioned, and — dollars as an additional allowance, and that the plaintiff thereupon, within thirty days next hereafter, pay into court and deposit the amount of the residue of said fund, principal and interest to the time of such payment, with the clerk of this court, for the benefit of such defendant as shall be found to be entitled thereto; and that the plaintiff, upon so paying said amount into court, and depositing the same with the clerk thereof, be dismissed from the further prosecution of this action, and thereupon be released, acquitted and discharged from all claims or liability to either of the defendants in this action, for, upon or by reason of, said fund.

And it is further *ordered, adjudged and decreed* that the said defendants do interplead, settle and adjust their several claims, demands and matters in controversy in this action, as between themselves.

[And, for that purpose, it is further *ordered and adjudged* that it be, and is, hereby referred to W. O., Esq., of —, as sole referee, to hear and determine the same, fourteen days' notice of such hearing to be first given to the respective defendants, or their attorneys, with power to such referee to require the said several defendants to present, try and determine their several and respective claims to the fund in controversy, before him, in such manner and under such regulations, as he may deem just and proper.

That the said referee, among other things, examine, ascertain and determine which of said defendants is entitled to the said fund so deposited with the clerk of this court; and if he shall be of the opinion that each of said defendants is equitably entitled to have a share in the same, that said referee also ascertain and determine what portion of said fund belongs to each. And that said referee do find, decide and report thereon with all convenient speed.]

CHAPTER X.

BILL (OR PROCEEDINGS) TO PERPETUATE TESTIMONY.

No. 418.

*Affidavit on application pending suit.*

See Vol II., pp. 137, 144, and note 3.

[*Title of cause.*]

— county, ss. A. B., being duly sworn, says: That the above entitled action is now pending in this court, and that this deponent is the plaintiff therein [or, *is a party defendant therein, the summons having been served on him on the — day of — last.*] That said action is brought to recover [*state nature and object of suit.*] That the defences are [*stating them,*] (\*). That deponent has fully and fairly stated the case in this cause to — Esq., his counsel therein, who resides at —, and has fully and fairly disclosed to him the facts which the deponent expects to prove by the witness hereinafter named. That deponent is advised by said counsel, and verily believes that [he has a good and substantial defence on the merits, in this cause, and that] the testimony of V. W., of —, is material and necessary for him, upon the trial of this action, and that without his testimony deponent cannot safely go to trial. That the said V. W. is now at — in this state. [*Here state the reason why the witness cannot be expected to attend the trial; as, old age; illness; return of foreign witness to his home; departure of a transient or non-resident person, etc.,*] (†) wherefore this deponent is desirous that the testimony of the said V. W. should be taken and perpetuated, pursuant to the statute.

Sworn etc.

A. B.

No. 419.

*Affidavit on application before suit brought.*

— county, ss. A. B. of —, being duly sworn says: That it is his intention to commence an action in the [supreme] court, against

APPENDIX OF PRECEDENTS.

C. D. [or, that E. F. of — is about to commence an action against this deponent] for the [foreclosure of a mortgage;] that the said —, resides within this state, at —, and is of full age, to wit, of the age of — years and upwards, [continue as in No. 418 from (\*) to (f).

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No. 420.

*Order for examination of witness, to perpetuate.*

[Title of cause, if one be commenced: if not, say: in the matter of the application of A. B.]

On the annexed affidavit of A. B., ordered that V. W. appear before me [or, before the Hon. C. L., county judge of — county,] at — on the — day of — inst. at — o'clock in the — noon [not less than fourteen days] to be examined, in order that his testimony may be perpetuated for the above entitled action [or, for an action expected to be commenced, between A. B. & C. D.]

Dated —.

[Judge's signature.]

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No. 421.

*Summons to witness, for examination to perpetuate.*

[Title as in No. 420.]

You are hereby summoned, at the instance of A. B., and required personally to appear before me, at —, in —, on the — day of — instant, to be examined, to the end that your testimony may be perpetuated, pursuant to the statute "Of proceedings to perpetuate testimony," for an action entitled as above, [or, expected to be commenced by A. B. against C. D.] And in case of your failure to attend and testify, you will be liable to pay to the party aggrieved all loss, hindrance and damage he may sustain thereby, and in addition thereto, you will forfeit the sum of fifty dollars.

Dated —.

[Signature of judge.]



CHAPTER XI.

BILL TO EXAMINE WITNESSES DE BENE ESSE.

See Nos. 70 to 77.

## BOOK V.

### PROCEEDINGS IN SPECIAL CASES.

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#### CHAPTER I.

#### SUITS BY JUDGMENT CREDITORS.

No. 422.

*Complaint by judgment creditor upon a justice's judgment.*

See Vol. II, p. 147, and notes 1, 2.

[*Title of cause.*]

The plaintiff, complaining on behalf of himself and all other judgment creditors of the defendant [whose executions have been issued and returned unsatisfied, and] who shall in due time come in and seek relief by, and contribute to the expenses of this action, alleges: that on the — day of —, 18—, at —, before —, a justice of the peace in and for the town of —, the plaintiff recovered a judgment, which was duly given and rendered by said justice against the defendant herein C. D., for — dollars damages, and — dollars costs, in an action wherein this plaintiff was plaintiff [or, *defendant*] and the defendant herein was defendant [or, *plaintiff*.] That on the — day of —, 18—, a transcript of the said judgment was filed and docketed in the office of the clerk of the county of —, [*if the judgment debtor resided in another county, add: and on the — day of —, a transcript of the same was filed and docketed in the office of the clerk of the county of —,*] in which county the said defendant then resided; [or, *in which county was the defendant's last known residence within this state, his residence at the time of issuing said execution being unknown to the plaintiff, and not ascertainable, although*

*the plaintiff made diligent inquiry therefor; or, in which county was the defendant's residence at the time of bringing said action, his residence at the time of issuing said execution, being unknown to the plaintiff, and not ascertainable, although the plaintiff made diligent inquiry therefor.]*

That the said execution has been duly returned by the said sheriff wholly unsatisfied, [or, *unsatisfied except as to the sum of — dollars,*] and there is now due to the plaintiff, on said judgment, — dollars, and interest from the — day of — 18—. (\*)

That at time of the recovery of the judgment above mentioned against the said C. D., he, the said C. D., was, and for several years previous thereto had been, engaged in mercantile business at —; and that the plaintiff is informed and believes that in the course of his said business, divers persons became indebted to the said C. D., and that the said C. D. has, at the time of filing this complaint, debts due to him from solvent and responsible persons, and for which he holds divers securities and evidences to a large amount, and has divers goods, wares and merchandise, or other articles of personal property which belong to him, or in which he is in some way or manner beneficially interested; and that he has equitable interests and things in action of some nature or kind, which might and ought to be applied to the payment of the said judgment against him the said defendant.

That the said defendant has property, debts and other equitable interests, things in action, or effects, of the value of more than one hundred dollars, exclusive of all prior just claims thereon, and which the plaintiff has been unable to reach by execution on said judgment. And that this action is not brought by collusion with the said defendant, or with any other person, or for the purpose of protecting the property or effects of the said defendant, or with any other person, or for the purpose of protecting the same against the claims of other creditors.

Wherefore, the plaintiff demands: 1. That the said defendant be adjudged to pay the amount of said judgment, with interest thereon, and the costs of this action, and adjudged to apply, for that purpose, any money, or property, or debts, choses in action and equitable interests belonging to him, or held in trust for him, or in which he is in any way or manner beneficially interested.

2. That he be enjoined and restrained from selling, assigning, transferring or interfering with any property, debts, things in action and equitable interests of any kind whatever, held or controlled by him, or by any other person held in trust for him, or for his use and benefit,

or in which he has any interest whatever, except where such trust has been created by, or the fund so held in trust has proceeded from some person other than the said defendant.

3. That said defendant be prohibited from making any assignment of his property, or confessing any judgment to enable other creditors or persons to obtain a preference over the plaintiff, or from doing any other act to enable other creditors or persons to obtain any portion of the defendant's property.

4. That a receiver may be appointed, with the usual powers and duties of receivers in like cases, of all said property, equitable interests, things in action, and effects of the said defendant, and the said defendant directed to execute to him an assignment thereof, and that the said receiver sell, or otherwise dispose of the same, and convert the same into money, as soon as may be; to the end that the necessary and proper directions may be given to the said receiver to apply so much of the proceeds thereof as may be necessary for that purpose, to the payment of the plaintiff's said debt, with interest and costs of this action; or for such other and further relief and judgment in the premises as shall be just.

J. C., Plaintiff's attorney.

[*Verification by plaintiff.*]

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No. 423.

*Complaint by judgment creditor, upon a judgment in supreme court.*

[*Title of cause.*]

The plaintiff complains of the defendant, and alleges the following facts constituting his cause of action:

That on the — day of —, 18—, the plaintiff recovered a judgment, in the supreme court of the state of New York, against the above named defendant, C. D. [*and one V. W.,*] for the sum of — dollars damages, and — dollars costs; which judgment was duly docketed in the said county of [*Oneida,*] and a transcript of said judgment was thereupon duly filed and judgment docketed in the office of the clerk of Saratoga county, on the — day of —, 18—.

That on the — day of —, 18—, the plaintiff caused to be issued and delivered to the sheriff of Saratoga county, where the defendant

then had and still has a place of business, [and there resided and still resides] an execution, in the usual form, directed to the sheriff of said county, by which the said sheriff was commanded to satisfy the said judgment out of the personal property of the said C. D. [and the said V. W., or either of them], and if sufficient personal property could not be found, then out of the real property of the said C. D. [and said V. W., or either of them] belonging to him [or either of them] on the day when the judgment was docketed in said county of Saratoga, or at any time thereafter; and that said execution was, before the delivery thereof, duly indorsed with a direction to said sheriff to levy for \$— damages and costs, with interest thereon from the — day of —, 18—, besides sheriff's fees.

That said sheriff has duly made return of said execution to the office of the clerk of Oneida county, that said defendant [or, *that said defendants or either of them*] had no goods or chattels, lands, tenements or real estate within his county whereon to levy and satisfy the said execution, or any part thereof [except the sum of — dollars, which he had levied and collected.] And there is now actually due and unpaid, upon the said judgment the sum of — dollars, and interest thereon from the — day of —, 18—.

[Continue as in No. 422 from the (\*) to the end.]

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#### No. 424.

*Affidavit annexed to complaint in creditor's suit, on which to move for injunction or receiver.*

[Title of cause.]

— county, ss. J. C., attorney for the plaintiff in this action, being duly sworn, says: That he was the plaintiff's attorney in the action and proceedings mentioned in the annexed complaint, in which the judgment therein mentioned, in favor of the said plaintiff, against the said C. D. [and V. W.] was obtained, and has personal knowledge of all the facts set forth in said complaint relating to said action and judgment, and the proceedings thereon, including the delivery of the said execution to, and return by, the sheriff; and that such facts, as set forth in said complaint, are true. That the facts stated in said complaint relative to the residence, and [or] place of business, and the

business transactions of the said defendant, are also true; as are, also, the facts in relation to his equitable property, things in action, etc., as the deponent has learned by repeated interviews and conversations with the said defendant, etc.

Sworn, etc.

J. C.

No. 425.

*Complaint against judgment debtor, and his assignee, to set aside assignment.*

[*Allege recovery of judgment, and issuing and return of execution, as in No. 422 or 423.*] That after the contracting of the debt on which the aforesaid judgment was recovered the said C. D. [*judgment debtor*] assigned all his property to the defendant E. F., [*the assignee*] in trust for the payment of his debts, [or, *made an assignment, of which a copy is annexed as a part of this complaint.*] That the said E. F. accepted the said trust, and has collected a large sum of money and other property from the assets so assigned, amounting in all to the value of more than one hundred dollars. That the said assignment was made by the said C. D. with the intent to hinder, delay and defraud his creditors; that it was not accompanied by an immediate and continued change of possession of the property; that since the same was executed and delivered, and up to the present time, the said property has remained in the actual possession and under the control of said C. D., who has retained possession and control thereof under the false and fraudulent pretence that he is agent of said C. D.

That the pretended indebtedness set forth in said assignment as due from said C. D. to the defendant G. H., [*preferred creditor,*] is fictitious; that in fact no such indebtedness exists, but that the same is therein inserted for the purpose of enabling said C. D. to distribute the proceeds of the goods passed under the assignment, among his friends, and thereby to keep the possession and control thereof himself.

That the defendant C. D. has not any other property than that embraced in the assignment aforesaid, out of which the said assignment could be satisfied, in whole or in part; that unless the said property can be reached and applied to the payment of said judgment, the same must remain wholly unpaid.

Wherefore, the plaintiff demands judgment:

APPENDIX OF PRECEDENTS.

1. That said assignment be adjudged fraudulent and void as against the plaintiff, [*and such other judgment creditors of said C. D. as shall elect to come in and share the expenses of this action.*]

2. That a receiver of all the property and effects of said C. D. be appointed.

3. That the defendants be adjudged to account for all the property received by them, or either of them, under said assignment, and for all the proceeds arising from the sale thereof, and deliver the same to such receiver.

4. That the defendants be, in the meantime, enjoined and restrained from disposing of any of said property, or paying away any of the proceeds thereof, or in anywise interfering therewith.

5. That said receiver pay, out of the proceeds of said property, the judgment aforesaid, and the costs and expenses of this action, and hold the balance subject to the further order of this court.

6. Or for such other or further relief and judgment in the premises as shall be just.

[*Verification by plaintiff.*]

J. C., Plaintiff's attorney.

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No. 426.

*Complaint against judgment debtor, to set aside a fraudulent judgment and sale.*

[*Commence as in No. 423, and allege, as therein, the recovery and docketing of judgment, etc.*] That previous to the time of the docketing of said judgment in said county of ———, the said defendant, C. D., was the owner, in fee simple, of certain real estate situate in said county of ———, described generally as follows: [*insert brief description.*] That said defendant was also the owner, and in possession of certain personal property not exempt by law from execution, to wit, [*description and value of property.*]

That the said plaintiff caused an execution to be issued and delivered to the said county of ———, where said defendant, C. D. then resided and still resides, and where said property is situated, on the ——— day of ———, 18—, in the usual form, commanding the said sheriff to satisfy the said judgment and execution out of the personal property of the said defendant, C. D.; or, if sufficient personal pro-

perty could not be found, then out of the real property belonging to said defendant on the day when the said judgment was so docketed in said county of ———, or at any time thereafter; and said execution is still in the hands of said sheriff, not returned, and is still unsatisfied, in whole or in part.<sup>(a)</sup>

That prior to the entry of the said judgment, but after the indebtedness upon which the aforesaid judgment was rendered had accrued, the said defendant, C. D., authorized a judgment to be entered, on confession, in the supreme court, against him, in favor of the defendant, E. F., for the sum of ——— dollars damages, and ——— dollars costs, for a pretended debt of that amount for money alleged to have been previously lent and advanced by said E. F. to the said C. D.

That such proceedings were thereupon had, that said judgment was so entered, for such sum, in the county of ———, on the ——— day of ———, 18—, and execution being thereupon issued, upon the said judgment, the personal property hereinbefore mentioned, was thereunder sold, at public auction, by the sheriff of the said county of ———, on ———, etc., and was struck off to said defendant, E. F., at a sum far less than its real value, who thereupon took possession and is now in possession of the same, claiming to be the owner thereof. And the personal property of the said C. D. not being sufficient to satisfy the said judgment, the real estate of the said C. D. was, on the ——— day of ———, 18—, exposed to sale by the sheriff of said county, under an execution issued upon said judgment, and was struck off to the said defendant, E. F., (also at a price much below its real value,) his being the highest bid for the same; and the said sheriff thereupon executed, in duplicate, and delivered to the said E. F., his certificate of sale of the said real estate, on the ——— day of ———, 18—, aforesaid; but no deed or conveyance has yet been executed by said sheriff, the time for such conveyance not having yet arrived.

The plaintiff alleges, on information and belief, that the said last mentioned judgment was fraudulently confessed by the said C. D. to the said E. F., and for the purpose of covering up his said property and defrauding the plaintiff in the collection of his said debt and demand. That said C. D. was not indebted to the said E. F. in said sum of ——— dollars, for which said judgment was so confessed, or in

<sup>(a)</sup> This paragraph may be omitted, if the incumbrance sought to be removed be upon real estate only.



APPENDIX OF PRECEDENTS.

any other sum; but said judgment was confessed without any consideration, and the sale of said property made with the full knowledge and concurrence of said defendant E. F. with the intention and design of cheating and defrauding this plaintiff out of his said debt and demand, and of transferring the ostensible ownership and possession of the property of said C. D. liable to execution, to the said defendant E. F., so as to prevent this plaintiff, or any other creditor, from levying upon and selling the whole or any part of said property in satisfaction of his or their debt or debts and demands.

The plaintiff further alleges, on information and belief, that the said real estate cannot be sold for a sum more than about one-half the amount of the plaintiff's said judgment; and that said defendant E. F. is a man of no pecuniary responsibility, and is possessed of little or no property, other than that so bid in by him, as aforesaid, and is in embarrassed circumstances.

Wherefore, the plaintiff demands judgment against the defendants that the said judgment in favor of the said E. F. against the said C. D., and the proceedings and sale under it, including the sheriff's said certificate of sale, be set aside, vacated and declared null and void; that an injunction be allowed, restraining the said defendants, or either of them, from disposing of, transferring, encumbering or in any manner interfering with, the said property, or any part thereof; and that a receiver be appointed, with the usual powers and duties, to whom the said defendants shall be directed to assign the said property, real and personal, and all other estate, property and effects of said defendant C. D.; and who shall be authorized and directed to sell the same, or so much thereof as shall be necessary for that purpose, and apply the proceeds, or so much thereof as shall be necessary, to the payment of the plaintiff's said judgment and interest thereon, together with the costs of this action; or for such other or further relief as this court shall think proper to grant.

[*Verification.*]

J. C., Plaintiff's attorney.

(To enable plaintiff to move for injunction or receiver add affidavit of a third person, swearing positively to material facts, as in No. 424.)

## No. 427.

*Complaint against judgment debtor and his trustee, to reach the trust fund, or the income thereof.*

[*Allege the recovery and docketing of judgment and issuing of execution and its return unsatisfied, as in No. 422 or 423, then continue:*] the defendant C. D. [*the judgment debtor*] is the beneficiary under a trust created by deed heretofore executed by him, [*or, created by the will of —, deceased,*] of which a copy is hereto annexed, as a part of this complaint. That the fund, consisting of about the sum of — dollars, is now in the hands of the deponent E. F. [*the trustee*] as trustee [*or, executor,*] and the defendant C. D. is entitled to receive or does receive, annually, the sum of — dollars, therefrom. [*If it be a trust under which the plaintiff can reach only surplus income, say:*] that the defendant C. D. is a man without family, and resides at —, where he has been for the — years, last past, and still is boarding, and the sum of — dollars, annually, is a reasonable sum for his support; and that the sum of — dollars, annually, is surplus income; [*if the plaintiff is entitled only to the accrued surplus, add:*] of which surplus, — dollars is in the hands of the defendant E. F. already accrued, but not paid over.

Wherefore, the plaintiff asks that the defendants be enjoined and restrained, respectively, from paying over and from receiving said fund [*or, so much of said income, already accrued, as is not necessary for the support of the said C. D. and his family,*] and that the sum be applied to the satisfaction of the plaintiff's judgment and interest, and the costs of this action, or for such other, etc. [*Conclude as in No. 422.*]

## No. 428.

*Order to show cause against injunction, on creditor's complaint.*

At a special term, etc. [*if made by the court.*]

[*Title of cause.*]

On the complaint in this action, duly verified, and the affidavit of —, thereto annexed, it appearing to my [*or, to the*] satisfaction [*of the court*] that sufficient cause exists therefor, it is *ordered*, that the defendant show cause before me [*or, a justice of this court*] at chambers in the city of —, on the — day of — next, at ten o'clock in the

forenoon, why the said defendant C. D. and his agents and attorneys should not be enjoined and restrained (\*) from selling assigning or transferring, receiving, collecting, discharging or incumbering, or in any manner disposing of, or interfering with any property, real or personal (not exempt by law from execution,) things in action or other equitable property or interests, of any kind whatever held or controlled by him, or by any other person held in trust for him, or for his use and benefit, or in which he has any interest whatever, except where such trust has been created by, or the fund so held in trust has proceeded from other persons than the said defendant; and also from making any assignment of his property, and from confessing any judgment for the purpose of giving preference to any other creditor over the plaintiff; or from doing any other act or thing to enable other creditors or persons to obtain any portion of his said property. (†) And it is *further ordered*, that in the meantime, and until the further order of the court, or a judge thereof, the said defendant and his agents and attorneys be, and he is hereby enjoined and restrained from doing or suffering any such act or thing in regard to his said property, rights and interests.

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No. 429.

*The like, with a clause for appointment of receiver.*

*As in No. 428 to the (†), then add.:*] also, why a receiver of the estate, property, rights, interests and effects of the said defendant C. D., with the usual powers and duties, and upon the usual directions, should not be appointed, according to the statute and the practice of the court. And in the meantime, [*add last paragraph of No. 428.*]

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No. 430.

*Injunction order in creditor's suit.*

See Vol. II., p. 168, note 43.

[*Title of cause.*]

On the return of the order to show cause, made by me, [or, *by the court, or, by the Hon. —,*] in the above entitled action, on the —

day of —, and returnable this day, at my chambers, in the city of —, after hearing J. C., of counsel for the plaintiff, and no sufficient cause to the contrary being shown, it is *ordered*, that the said order to show cause be, and the same hereby is, made absolute, upon the said plaintiff executing and filing his written undertaking, with one sufficient surety pursuant to the statute and practice of this court, to the effect that he will pay the said defendant such damages, not exceeding the sum of — dollars, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff is not entitled thereto.

And it is *further ordered*, that the said defendant be enjoined and restrained [*as in No. 428 from the (\*) to the (†), then add.*] until the further order of the court.

Dated —.

J. P., Justice of supreme court.

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No. 431.

*Order of reference to appoint a receiver in creditor's suit.* See No. 373.

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No. 432.

*Supplemental complaint, in creditor's suit.* See No. 408.

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No. 433.

*Notice of application for judgment, and appointment of receiver, in creditor's suit.*

[*Title of cause.*]

Take notice that upon the pleadings and proceedings in this action, and the affidavit with a copy of which you are herewith served, and proof that no demurrer or answer has been received, a motion will be made, at the next circuit and special term of this court, to be held at the court house in —, on the — day of — next, for the relief

demand in the complaint, with the costs of action; also that a receiver be appointed, by the court, of the estate, property and effects of the defendant C. D., with the usual powers and directions, and with such security and in such form as the court shall direct and require; or for such other or further relief as the court shall think proper to grant.

Dated —.

J. C., Plaintiff's attorney.

To A. P., Esq., Defendant's attorney.

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No. 434.

*Report of referee appointing receiver in creditor's suit.*

[*Title of cause.*]

To the Supreme Court of the State of New York.

In pursuance of an order of this court, made in the above entitled action, on the — day of —, 18—, whereby, among other things, it was referred to the undersigned to appoint a receiver in this action, and to take from such receiver the requisite security; I, W. O., the referee named in said order, do report: that I have been attended on the said reference by the attorney and counsel of the plaintiff and of the defendant C. D. That I thereupon proceeded on the matters so referred. That G. H., of —, was proposed on the part of the plaintiff to be the receiver in this cause; and no objection being made to his appointment, and deeming him a fit and proper person for such trust, I have appointed him to be such receiver. That the said G. H. thereupon executed a bond, in the usual form, to the people of the state of New York, in the penal sum of — dollars, conditioned for the faithful discharge of his duties as such receiver.

That J. K. and L. M., of —, were proposed as sureties of the said receiver; and being satisfied, by their affidavits of justification, that they were each worth the requisite amount, I approved of the said sureties as sufficient. And I further report that I have caused the said bond, with my approval indorsed thereon, and the said affidavits of justification, to be filed in the office of the clerk of this court at —.

All of which is respectfully submitted.

Dated —.

W. O., Referee.

No. 435.

*Order of court appointing receiver in creditor's suit.*

At a special term etc.

[*Title of cause.*]

On reading and filing summons, complaint and affidavits, and due proof of service of notice of motion therefor [or, *on* reading and filing report of W. O., Esq. referee appointed to nominate a suitable and proper person as receiver, and report thereon, and also as to the sufficiency of the security proposed, bearing date — by which it satisfactorily appears that G. H. is a suitable and proper person to be appointed receiver, and that the sureties proposed by him, have justified and been approved by the referee, and executed, jointly with said G. H., a bond, which has been duly filed,] on motion of J. C., of counsel for the plaintiff, no one appearing to oppose [or, *after hearing A. P. attorney for the defendant, in opposition thereto;*] ordered that G. H. of —, be and he is hereby appointed receiver of the estate and property, real and personal, things in action, debts, equitable interests and other effects of the said C. D. and which belonged to or were held in trust for him, at the time of commencing this action, or in which he had any beneficial interest, except such property as is by law exempt from execution; and also except where such trust has been created by, or the fund so held in trust has proceeded from, some person other than the said defendant. [*If there be property which the plaintiff seeks to subject to his execution, after removing incumbrances, add:*] and of the property hereinafter described, and the rents, issues, income and profits thereof, to wit: [*describing property.*] It is further ordered that such receiver be vested with the usual powers and duties of a receiver, according to the statute and the practice of the court. Also, that the said C. D. do assign, transfer and deliver over to said receiver, on oath, all the estate, property, choses in action and effects as to which such receiver is appointed as aforesaid, with all vouchers and papers relating thereto.

It is also ordered that such receiver shall have general power and authority to enforce and collect any debts, demands and rents belonging to the said C. D. which may be transferred to him, and to compromise and settle such as are unsafe, or of a doubtful character. He may also sue in the name of the debtor, where it is necessary or proper for him to do so; but he will not, in his accounts, be allowed for the costs of any suit brought by him against an insolvent from whom he is unable to collect his costs; unless such suit is brought by order of

the court, or by the consent of all persons interested in the funds in his hands. And the tenants of such real estate of the said C. D. as may be assigned or transferred to the said receiver are to attorn to such receiver; or the said receiver may, when necessary, apply for an order that any of such tenants attorn and pay rents to him. And such receiver is hereby permitted to make leases, from time to time, as may be necessary, of any such real estate, for a term not exceeding [one year.] It is also hereby made the duty of the said receiver, without any unreasonable delay, to convert all the personal estate and effects, which may be assigned or delivered over to him, into money; but he is not to sell any real estate without the special order of the court, although he may sell desperate debts and all other doubtful claims to personal property, at auction, giving at least ten days public notice of the time and place of such sale.

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No. 436.

*Bond of receiver in creditor's suit.* See No. 372.

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No. 437.

*Order appointing referee to take examination of judgment debtor, and to direct assignment and delivery of his property, and conveyance of his real estate.*

See Vol. II., p. 168, and note 42.

At a special term, etc.

[*Title of cause.*]

The summons and complaint in this action having been served more than twenty days since, and no answer or demurrer having been received on behalf of the defendant, C. D. [or, *this action having been brought to trial before the court without a jury, and the decision of the judge, thereon, having been filed, whereby he finds, etc., or, the issues of fact settled in this action having been tried by a jury, and the verdict of the jury thereon having been filed and entered, etc., etc.,*] now on motion of J. C. of counsel for the plaintiff, and after hearing N. P., counsel for the defendants, ordered that it be referred to —, Esq., of —, to

take the examination of the defendant, C. D., and of such witnesses as shall be produced before him, under oath, concerning the property, chattels, things in action, equitable interests and effects of the said defendant, C. D., and to report the same to this court, with all convenient speed. And the said referee is authorized and hereby empowered, to direct the assignment, transfer and delivery to the receiver heretofore [or, *herein*] appointed of any and all property of of said defendant, goods, chattels, things in action and equitable interests, which shall or may be discovered in his possession or under his control, and belonging to or held in trust for him at the time of the commencement of this action, except such property as is by law exempt from execution, and except where the trust has been created by, or the fund so held in trust has proceeded from some person other than said C. D. [*If there be real estate, add:*] and also to direct a written assignment and conveyance to said receiver, of the real estate of the said C. D., mentioned and described in the complaint.

And it is *further ordered* that said defendant, C. D., do appear and attend, from time to time, and whenever summoned or required so to do, before said referee, and produce such books, accounts and papers, and submit to such examination as the said referee shall direct, in relation to any matter which he may lawfully be required to disclose.

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No. 438.

*General assignment to receiver, in creditor's suit.*

See Vol. II., p. 168, and note 42.

[*As in No. 376 to the* (\*), *then continue:*] all and every the estate, real and personal, chattels real, moneys, outstanding debts, things in action, equitable interests, property and effects whatsoever and wheresoever, of or belonging, or due, to or held in trust for, the said party of the first part, or in which he had any right, title or interest at the time of commencing this action, to wit, on the — day of —, 18—, (except such articles of personal property as are exempt by law from sale on execution, and except, also, where such trust has been created by, or the fund held in trust has proceeded from some person other than the said party of the first part;) and also all deeds, writings, leases, muniments of title, books of account, papers, vouchers and



other evidences relating or appertaining to the said property, equitable interests, things in action and effects hereby granted and conveyed or intended to be granted and conveyed. To have and to hold the same unto him the said party of the second part, as such receiver as aforesaid, and to his successors and assigns; subject to the present and future orders, and the direction and control of the said supreme court. And for the better and more effectually enabling the said party of the second part, his successors and assigns, to recover and receive all or any part of the estate, property, book debts, things in action and effects hereby granted, conveyed, assigned and transferred, he, the said party of the first part, hath made and appointed, and by these presents doth make and appoint, the said party of the second part his successors and assigns, the attorney and attorneys of him, the said party of the first part, in his name or otherwise, to commence, continue, discontinue, and again bring, perfect and carry out, actions and suits against any corporate company, association, firm, person or persons, for or on account of, all or any part of the said estate, property, equitable interests, things in action or effects.

In witness whereof the party of the first part hath hereunto set his hand and seal, the day and year first above written.

Sealed and delivered } [Signature and seal.]  
 in presence of } .

(Usual acknowledgment or proof of execution.)

I approve of the within assignment, and direct that the party of the first part [execute and] deliver it to the party of the second part.

Dated ———. [Signature of referee.]

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No. 439.

*Deed transferring real estate of debtor's receiver in creditor's suit.*

This indenture, made the — day of —, 18—, between C. D., of —, of the first part, and T. N., of —, receiver appointed by the supreme court of the state of New York, of the second part, witnesseth. Whereas, in and by an order of the said supreme court, made in a certain action therein, on the — day of —, 18—, wherein the said A. B. was plaintiff, and the said C. D. was defendant, it was,

among other things, ordered that the said C. D. should execute, acknowledge and deliver to the said T. N., receiver in said action, under the direction of W. O., the referee appointed in and by said order, a conveyance and assignment of the real estate mentioned in the complaint in said action, and of the rents, issues and profits thereof. Now this indenture witnesseth, that the said party of the first part, in obedience to the said order, and in consideration of the premises aforesaid, and of one dollar [*proceed as in No. 377 to the end including approval of referee.*]

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No. 440.

*Judgment in creditor's suit, for payment of plaintiff's debt.*

[*Title of cause.*]

The summons and copy complaint in this action having been served personally on the defendant, more than twenty days since, and no demurrer or answer having been received, and an interlocutory order having been made, bearing date on the — day of —, 18—, whereby a receiver was appointed of the estate and property, equitable interests and effects of the defendant C. D. with the usual powers and duties, and upon the usual directions; and the said receiver having become duly qualified, by filing the requisite security, and taken upon himself the duties of said trust, and he having proceeded to reduce said property and effects to money, as far as practicable [*and collected a sum sufficient, as appears by his report thereof, or, by the report of —, referee, appointed to take and state said receiver's accounts;*] now, therefore, on motion of —, etc. it is *adjudged*, (\*) that out of the moneys in the hands of the said receiver, so collected and held by him, such receiver, after deducting his charges for disbursements and commissions at the rate allowed by law, do pay the plaintiff or his attorney, his costs and disbursements of this action, the sum of — dollars, and take his receipt therefor. And that out of the residue of said moneys, he pay the said plaintiff or his attorney, the amount of his debt and judgment, to wit, the sum of — dollars, with interest thereon from the time said judgment was entered, to wit, the — day of —, 18—, and take from said plaintiff an acknowledgment of satisfaction of said judgment, and deliver the same to said defendant [*or, to the clerk of the county of —,*] to the end that said judgment may be cancelled

and discharged of record. [*If there are no other claimants of the fund, add:*] and it is further adjudged that said receiver pay over to the said defendant, the residue of the money so remaining in his hands, or to account with him for the same, and deliver to him all and singular, the property and effects, books of account, evidences of debt or other papers or documents relating to said trust estate, on demand of said defendant: and also, if said defendant shall so require, that said receiver execute back to him a general release and assignment of all and singular the property, equitable interests and effects of the said trust estate remaining in his hands undisposed of. On which assignment and delivery being made, it is adjudged that the said receiver be discharged from his said trust, and his bond be delivered up to him and cancelled.

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No. 441.

*The like—setting aside and declaring void a fraudulent incumbrance.*

[*As in No. 440 to the (\*)*, then continue:] that the judgment of this court, entered on confession, in the clerk's office of the county of —, on the — day of —, 18—, in favor of the defendant in this action, E. F., against the defendant, C. D., for the sum of — dollars, damages, and — dollars costs, together with the proceedings thereunder, including the execution issued on said judgment, the sale of the real estate and personal property thereon, and the sheriff's certificate of sale of the real estate to the defendant E. F., bearing date the — day of —, be, and the same hereby are, set aside and vacated, and declared null and void and of no effect whatever; and the said judgment is ordered and adjudged to be cancelled and discharged of record by the clerk of said county of —.

And it is further adjudged that the plaintiff in this action be authorized to proceed upon his execution issued on the judgment in the supreme court, wherein he is plaintiff, and said C. D. defendant, for — dollars, damages and costs, entered in the office of the clerk of the county of —, and a transcript thereof filed and docketed in the county of —; or issue another execution thereon, if it be necessary; and that said defendant E. F., turn out and deliver to said sheriff, upon such execution so issued, or hereafter to be issued, said personal

property, to wit, [*describing it,*] to be sold and applied upon the same; and if not sufficient to satisfy the same, with interest thereon, and sheriff's fees, and costs of this action, herein adjudged at the sum of — dollars, which the said defendant C. D. is hereby adjudged to pay to the said plaintiff, that said sheriff thereupon proceed to advertise and sell said real estate for the payment and satisfaction of the same.

And it is further adjudged that if said property, real or personal, be not sufficient to pay said judgment, interest and sheriff's fees, and the said costs of this action, the said plaintiff have further execution for the same, against the defendant C. D.

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No. 442.

*The like—setting aside a fraudulent conveyance, etc.*

[*As in No. 440 to the (\*), then continue:*] that the deed of conveyance, executed by the defendant, C. D., to the defendant, E. F., of the premises mentioned and described in the complaint, bearing date the — day of —, be, and the same is, hereby declared fraudulent, and null and void; and it is adjudged that the same be set aside and discharged of record, and that said defendants execute, acknowledge and deliver to the said receiver a conveyance and quit claim of said premises, which are described in the complaint as follows: [*insert description.*] And it is further *adjudged* and *ordered* that the said receiver do forthwith thereafter proceed to sell, at public auction, [*specify mode of sale, advertising, etc.,*] the said property so conveyed; and out of the proceeds thereof, after first deducting the expenses of said sale, and his lawful charges and commissions, that said receiver do pay to the plaintiff or his attorney, the costs of this action, herein adjusted and settled at the sum of — dollars; and out of the residue thereof, if there be sufficient for that purpose, that he pay the said plaintiff's debt and judgment, to wit, the sum of — dollars, with interest thereon from the — day of —, 18—, [*directing the residue either to be paid over to the defendant, and the receiver discharged, or brought into court, etc.*]

No. 443.

*The like—dismissing complaint, with costs to be set off.*

At a special term, etc.

[*Title of cause.*]

This action having been brought on for trial before the court, without a jury, and the decision in writing of the judge having been made and filed, whereby he finds and decides [*stating substance of findings:*] now, therefore, on motion of —, counsel for the defendant, it is adjudged that the summons and complaint in this action be, and the same hereby are, dismissed; and that the said defendant recover against the plaintiff the sum of — dollars, adjusted and settled as and for the costs and disbursements of this action; and that the said costs be, and the same hereby are, set off against so much of the plaintiff's said judgment in the supreme court, against the defendant, mentioned in said complaint, and entered in the office of the clerk of the county of —, on the — day of —, 18—, for — dollars, damages and costs.

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No. 444.

*Petition, by judgment creditor, for leave to come in as a party to creditor's suit.*

See Vol. II., p. 169, and notes 45, 46.

[*Title of cause.*]

To the Supreme Court of the State of New York.

The petition of J. M., of —, respectfully sheweth: That he is a creditor by judgment, of the defendant, C. D., in this action; that his said judgment was obtained in the supreme court against the said defendant, for the sum of — dollars, damages and costs, and was duly entered and docketed in the county of —, on the — day of —, 18—, and is wholly [or, *in part*] unpaid. That execution in the usual form, was duly issued on said judgment, directed to the sheriff of the county of —, where said defendant then resided, [and now resides,] by which the said sheriff was commanded to satisfy the said judgment out of the personal property of the said C. D., and if sufficient personal property could not be found, then out of the real property of the said C. D. belonging to him on the day when the

judgment was so docketed in said last mentioned county, or at any time thereafter. And said execution was, before the delivery thereof, duly indorsed with a direction to said sheriff to levy for — dollars, damages and costs, with interest thereon from the — day of —, 18—, besides sheriff's fees. That said sheriff has duly made return of said execution to the office of the clerk of — county, that said C. D. had no goods or chattels, lands, tenements or real estate within his county, whereon to levy and satisfy the said execution, or any part thereof, [or, *if part has been satisfied, and no goods, etc., as to the residue, so state.*] And there is now actually due and unpaid upon the said judgment the sum of — dollars, and interest thereon from the — day of —, 18—. [*If the action be to remove a fraudulent incumbrance, show that a specific lien has been acquired upon the property, as in No. 426.*]

That this action was commenced on or about the — day of —, 18—, in favor of the plaintiff and all other persons, being judgment creditors, similarly situated, who should come in and contribute to the expenses thereof, against the defendant C. D., for [*state substance of demand for relief in complaint.*] And such proceedings have been had in said action that by an interlocutory order of judgment in said action, a receiver has been appointed of the property and effects of said C. D., and said receiver has become duly qualified to act by filing the requisite security, and is now in possession of the property and effects of the said C. D.

Your petitioner further shows, that since the appointment of said receiver, now more than [one year] last past, no proceedings whatever have been taken, in said action [the said plaintiff's attorney having died, and no person appointed in his place,] and no steps whatever have been taken by the plaintiff, or the said receiver, for bringing the said action and proceedings to a close.

Your petitioner further shows that he is desirous of being made a party to this action, and of prosecuting the same to its final termination, by collecting in and distributing the assets of said C. D. pro rata, among all the creditors, and is willing, and hereby offers, upon being allowed to come in as such party, to contribute his proportion to the expenses of such action.

Wherefore, your petitioner prays that, by an order of this court, he may be allowed to come in and be made a party plaintiff to this action, with the said plaintiff, A. B., upon payment to him of your petitioner's ratable share of the costs and expenses of this action, in proportion to

the amount of his said judgement, to be settled by the clerk, or otherwise ascertained and allowed by the court; or for such other or further relief as to the court shall seem proper.

And your petitioner will ever pray.

Dated —.

J. M

[Add verification, as in No. 290.]

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No. 445.

*Order upon No. 444*

At a special term, etc.

[*Title of cause.*]

On reading and filing petition of J. M., duly verified and bearing date the — day of —, praying for leave to come in as a party plaintiff, on contributing to the expenses of this action, on motion of —, of counsel for the petitioner, and after hearing —, of counsel for the plaintiff; *ordered*, that the said J. M. be allowed to come in, and that he be and hereby is, made a party plaintiff in this action, on paying to the plaintiff A. B. the sum of — dollars, being his ratable proportion of the costs and expenses of this action, [*or*, that it be referred to the clerk of this court to settle the costs and disbursements of this action, and ascertain and report to the court the amount thereof, and what would be the ratable share thereof in proportion to the amount of his judgment, for the said J. M. to contribute and pay; to the end that on the coming in and confirmation of said report, a further order may be made, allowing the said J. M. to come in and be made a party plaintiff, on payment of his just proportion of such costs and expenses.]

CHAPTER II.

ACTION FOR FORECLOSURE OF MORTGAGE AND SALE OF PREMISES.

No. 446.

*Summons, and notice of object of the action.*

See Vol. II., p. 179, and note 16.

[*Title of cause.*]

To —, the above named defendant :

You are hereby summoned to answer the complaint of A. B., the plaintiff in this action, which will be filed with the clerk of the [city and] county of —, and to serve copy of your answer on me, at my office in the village of —, within twenty days after the service of this summons, exclusive of the day of service : and if you fail to answer said complaint as hereby required, the plaintiff will apply to the court for the relief demanded in the complaint.

Dated —, 18—.

J. C., Plaintiff's attorney.

To the above named defendant :

Please to take notice, that the object of the above action, in which a summons is herewith served upon you, is to foreclose a mortgage bearing date the — of —, 18—, executed by C. D. to the said plaintiff [or, to *E. F.* and duly assigned to said plaintiff on the — day of —, 18—,] and recorded in the office of the clerk of the county of —, in book of mortgages, No. —, page —, on the — day of —, 18—, at — o'clock —. M. Said mortgage was executed to secure the payment of the sum of — dollars, with interest from [the date thereof] upon which there is now claimed to be due the sum of — dollars, with interest from said — day of —, 18—, upon the following described premises, namely : [*describe premises.*] No personal claim is made against you, or against any defendant, except —.

Dated —.

J. C., Plaintiff's attorney.



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No. 447.

*Notice of lis pendens.*

See Vol. II., p. 178, and note 14; id. 179, and note 15.

[*Title of cause.*]

Notice is hereby given, that an action has been commenced and is now pending in the supreme court of the State of New York, upon a complaint of the above named plaintiff against the above named defendant praying for the foreclosure of a certain mortgage, bearing date the — day of —, 18—, executed by C. D. to the said plaintiff [or, to E. F., and duly assigned to said plaintiff on the — day of —, 18—,] which said mortgage was recorded in the office of the clerk of the county of Saratoga, state of New York, in book No. — of Mortgages, on page — on the — day of —, 18— at — hours and — minutes —. M.

The mortgaged premises in the said county of Saratoga, affected by the said action of foreclosure, were at the time of commencing this action, and are at the time of filing this notice, situated in the town of Corinth, in the said county of Saratoga, and are described in said mortgage, as follows, viz.: [*insert description of premises, as contained in mortgage.*]

Dated —.

J. C., Plaintiff's attorney.

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No. 448.

*Affidavit of filing notice of lis pendens.*

See Vol. II., p. 179, and note 15; id. 183, and note 26.

[*Title of cause.*]

STATE OF NEW YORK, }  
county of Saratoga. } ss.

J. C., of the town of —, in said county, being duly sworn, says, that he is the attorney for the plaintiff in this action; that the same was brought to foreclose a mortgage. That the complaint herein was filed in the clerk's office of Saratoga county, on the — day of —, 187—. That a notice of the pendency of this action, in the form prescribed by section 132 of the Code of Procedure, containing the names of the

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parties thereto, the object of the action, the date of the said mortgage, and the parties thereto, the time and place of recording the same, the description of the mortgaged premises, and containing correctly and truly all the particulars required by law to be stated in such notice, was on the — day of — 187—, filed in the clerk's office of the county of Saratoga, that being the county in which the mortgaged premises were and are situated; and that since the filing of the said notice, the complaint in this action has not been amended by making new parties to the action or so as to affect other property not described in the original complaint, or so as to extend the claims of the plaintiff as against the mortgaged premises.

And this deponent further says, that [none] of the defendants are absentees.

And this deponent further says, that [none] of the defendants are infants.

Subscribed and sworn to before me, }  
this — day of —, 18—.

J. C.

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No. 449.

*Complaint, in foreclosure suit.*

See Vol. II., p. 177, and note 11.

[*Title of cause.*]

The above named plaintiff complains that the defendant, C. D., on or about the — day of —, one thousand eight hundred and —, executed under his hand and seal and delivered to the said plaintiff a bond, bearing date on that day, in the penal sum of — dollars, with a condition thereunder written, in substance, that if the obligor in the said bond, his heirs, executors or administrators, should pay or cause to be paid to the said plaintiff, the obligee in the said bond named, or to his assigns, the sum of — dollars, [*set forth condition of bond,*] then the said bond to be void; otherwise to be and remain in full force, as by the said bond, ready to be produced as this court shall direct, will more fully appear. And the said C. D., and M. D., his wife, to secure the payment of the principal and interest mentioned in the condition of the said bond, did, at the same time, execute under their hands and seals and deliver to the said plaintiff a mortgage, bearing the same date with the said bond, and conditioned for the payment of

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the said sum of — dollars, with interest, at the time and in the manner hereinbefore mentioned, according to the condition of the said bond; by which said mortgage the said C. D., and M. D. his wife, mortgaged unto the said plaintiff, his heirs and assigns in fee, certain lands and real estate, situated in the town of Corinth, in the said county of Saratoga; which said mortgaged premises were described in the said mortgage as follows: [*insert description of premises as in the mortgage.*] Which mortgage was duly acknowledged and certified, so as to entitle it to be recorded; and the same was afterward duly recorded as a mortgage in the office of the clerk of Saratoga county, on the — day of —, one thousand eight hundred and —, at — in the — noon, in book number — of mortgages, at page —, as by the said mortgage and the certificates of —, and of the recording aforesaid indorsed thereon, and now ready to be produced as this court shall direct, will more fully appear. (\*)

And plaintiff further says that the said defendants have failed to comply with the condition of the said bond and mortgage in this, to wit: by omitting and neglecting to pay the sum of — dollars, which became due on the — day of —, 18—; and there is now justly due the plaintiff upon the said bond and mortgage the sum of — dollars, with interest from the — day of —, 18—.

And the said plaintiff further says that no other proceedings at law, or otherwise, have been had to recover the debt secured by the said bond and mortgage, or any part thereof, and that the said defendants C. D., E. F., and G. H., have, or claim to have, some interest in, or lien upon said mortgaged premises, or some part thereof, as judgment creditors of said mortgagors, [*or, state the nature of the lien,*] which interest or lien, if any, is subsequent and subject to the lien of the said mortgage of the plaintiff.

The plaintiff therefore prays the aid of this court in the premises, and that the usual decree may be made for the sale of the mortgaged premises aforesaid, and for the payment out of the proceeds thereof, of the amount due the plaintiff for principal and interest, upon the said bond and mortgage, together with his costs in this action (†); and that the said defendants, and all persons claiming under them, subsequent to the commencement of this action, either as purchasers, incumbrancers, or otherwise, may be barred and foreclosed of all right, claim, lien and equity of redemption in the said premises; and that the defendant C. D. may be adjudged to pay any deficiency which may remain after applying all of said moneys so applicable thereto; that

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the purchaser or purchasers on the sale may be let into the possession of the premises sold; and that the plaintiff may have such further or such other relief as the nature of the case may require, and as to this court may seem proper and agreeable to equity.

J. C., Attorney for plaintiff.

(Verification by plaintiff, as in No. 1.)

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No. 450.

*The like—by assignee of mortgage.*

[As in No. 449 to the (\*), then add:] that on the — day of —, 18—, the said [mortgagee], by an instrument in writing, under his hand and seal, duly assigned said bond and mortgage, for value, to the plaintiff, who is now the holder and owner thereof. [Conclude as in No. 425.]

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No. 451.

*The like—by mortgagee, on a mortgage containing an interest clause.*

[As in No. 449 to the (\*), then add:] that the interest on the said bond and mortgage which, by the condition thereof, became due and payable on the — day of —, 18—, is still due and unpaid; that more than — days have elapsed since said interest became due and payable, and the plaintiff elects to deem the whole principal sum to be immediately due and payable; and he claims that there is now justly due to him, on the said bond and mortgage, — dollars, with interest from the — day of —, 18—. [Omitting the paragraph next after the (\*), conclude as in No. 449.]

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No. 452.

*The like—on a mortgage containing an insurance clause.*

[As in No. 449 to the (\*), then add:] that the defendant [mortgagor] failed to keep the buildings upon the said mortgaged premises in-

sured, according to the terms of the covenant contained in the said mortgage, but on the contrary, suffered the insurance thereon to expire, on the — day of —, 18—, and neglected to renew the same; in consequence whereof the plaintiff was obliged to cause them to be insured in the — Insurance Company of —, in the sum of — dollars, for the term of —, from the — day of —, 18—, and paid, therefor, the sum of — dollars, [*conclude as in No. 449; adding in the prayer for relief, after the (†),*] and the amount of said premium of insurance and interest.

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No. 453.

*The like—where payment of mortgage has been assumed by a purchaser.*

[*As in No. 449 to the (\*), then add.:*] that on the — day of —, 18—, the defendant [*mortgagor*] by deed dated on that day, duly conveyed the said mortgaged premises, subject to the said mortgage to the defendant [*owner of equity of redemption;*] which deed contained a covenant on the part of the latter, of which the following is a copy: [*insert covenant to assume the mortgage.*] And said conveyance was thereupon accepted by said [*grantee.*] [*Conclude as in No. 425; the prayer for relief including the grantee, as well as the mortgagor.*]

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No. 454.

*The like—alleging inadequacy of security, and praying for a receiver.*

[*As in No. 449 to the (\*), then add.:*] that the mortgaged premises consist of [*describe the premises and the buildings thereon;*] that the said buildings are old and out of repair, and rapidly deteriorating; that the present value of the premises does not exceed — dollars, and the same are subject to a prior mortgage, on which about the sum of — dollars is due; that they are a slender and inadequate security for the plaintiff's mortgage debt, and the defendants personally liable therefore are insolvent. [*And in the prayer for relief, ask: that a receiver of the rents and profits of said premises be appointed, by order of the court, to apply the same towards the payment of the plaintiff's demand.*]

## No. 455.

*Affidavit, to move for judgment or for reference to compute, etc., on default—whole amount due, and no infants or absentees.*

See Vol. II., p. 180, and note 18; id. 181, and note 19; id. 183, and note 26.

[*Title of cause.*]

—— county, ss. J. C., plaintiff's attorney, being duly sworn, says, that this is an action for the foreclosure of a mortgage upon land situate in the town of ——, in the county of ——. That the whole amount of the mortgage debt is due [or, *that —— dollars of the principal of said mortgage debt is due, with interest from the —— day of ——, 18—, and that the residue of the principal is to become due as follows: —— dollars on the —— day of ——, 18—, and —— dollars one year thereafter.*] That none of the defendants have appeared, or put in answers, or otherwise pleaded (\*), and none of them are non-residents, or under age.

Sworn, etc.

J. C.

## No. 456.

*Order of reference, upon No. 455.*

At a special term, etc.

[*Title of cause.*]

On filing proof of due service of the summons in this action on all of the defendants therein, and that no answer or demurrer to the complaint has been put in by any of said defendants, within the time allowed for that purpose, on motion of J. C., attorney for the plaintiff, it is ordered that it be referred to W. O., Esq., residing in the city of ——, to compute and ascertain the amount due to the plaintiff for principal and interest upon the bond and mortgage set forth in the plaintiff's complaint, and [the amounts due to such of the defendants as are prior incumbrancers, and] that he make report thereon with all convenient speed. [*When the motion is made, and the order sought to be enforced in a county other than that which is the place of trial, add:*] And the said referee is at liberty to proceed on such reference in the county of ——, [*where motion is made.*]

No. 457.

*Affidavit for order of reference, on default—infants or absentees.*

[As in No. 455 to (\*), then add:] except J. K., who is an infant defendant, and has, by his guardian, put in the usual general answer; that the defendants L. M. and N. O. are absentees, and service has been made upon them by publication of the summons, as appears by the affidavit of —, hereto annexed.

Sworn, etc.

[Signature.]

No. 458.

*Order of reference upon No. 457.*

At a special term, etc.

[Title of cause.]

On filing proof of due service of the summons in this action more than twenty days since, on the defendant C. D., and of service upon the defendants L. M. and N. O., who are non-residents of this state [or, *who cannot be found within this state,*] by the publication thereof, pursuant to the order of this court; and no answer having been put in by any of the defendants, except J. K., who is an infant, and has, by his guardian, put in the usual general answer, [and except the defendant —, whose answer does not controvert any material allegation in the complaint;] and the time for the defendants to answer or otherwise plead having expired, on motion of J. C., of counsel for the plaintiff, it is ordered, that it be referred to W. O., Esq., of —, as referee to compute and ascertain the amount due to the plaintiff on the bond and mortgage mentioned in the complaint, and to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent on oath, as to any payments which have been made to him, or for his use, and which ought to be credited on said bond and mortgage; and that he report the facts to the court [together with the proofs and examinations, except such as are documentary, and of those an abstract.]

No. 459.

*Affidavit for order of reference—whole amount not due; infants and absentees.*

[*Title of cause.*]

— county, ss. J. C., plaintiff's attorney, being duly sworn, says : That this is an action for the foreclosure of a mortgage on real estate situate in the town of — in said county of —. That the whole amount of such mortgage is not due, but that — dollars of the moneys secured thereby, with interest from the — day of —, 18—, is due, and the residue thereof is to become due as follows, to wit: [*state times and amounts.*] That the defendant, J. K. is an infant and has, by his guardian, put in the usual general answer; that the defendants L. M. & N. O. are non-resident absentees, and have been served by publication, pursuant to an order of this court; and that more than twenty days have elapsed since the last publication of the summons.

Sworn etc.

[*Signature.*]

No. 460.

*Order of reference on No. 459.*

At a special term, etc.

[*Title of cause.*]

On reading and filing affidavits, etc., showing that this action was brought to foreclose a mortgage, and that the whole amount secured thereby is not due; and showing the personal service of the summons upon all the defendants, more than twenty days since, and that no answer or demurrer has been put in by any of the defendants [*except J. K. who is an infant, and has, by his guardian, put in the usual general answer;*] and that all the defendants are of full age and resident [*except the said J. K. who is an infant, and L. M. and N. O., who are non-resident absentees, and have been served by publication pursuant to an order of this court.*]

On motion of J. C., attorney for the plaintiff, it is ordered, that it be referred to W. O., Esquire, residing in the village of —, to compute the amount actually due to the plaintiff on the bond and mortgage mentioned in the said complaint. And also, to ascertain and report the amount secured to be paid by said bond and mortgage, and which is not due and which remains unpaid, including interest thereon to the



date of such report. And also, to ascertain and report the situation of the mortgaged premises, and whether, in his opinion, the same can be sold in parcels without injury to the interests of the parties; and if he shall be of opinion that a sale of the whole of said premises, in one parcel, will be most beneficial to the parties, then that he report his reasons for such opinion. [*If there are infants or absentees, add:*] That said referee also take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff [*as in No. 458, to the end.*]

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No. 461.

*Referee's report, under order of reference to compute—where whole amount is due.*

[*Title of cause.*]

To the Supreme Court of the State of New York.

Pursuant to an order of this court, dated the — day of —, 18—, by which it was referred to me, W. O., as referee, to compute the amount due on the bond and mortgage mentioned in the complaint in this action, I, the said referee, do respectfully report:

That I have computed and ascertained the amount due to the plaintiff on said bond and mortgage, and that the amount so due for the principal and interest, up to and including the date of this report, is the sum of — dollars. (\*).

I further report that the schedule herewith annexed, marked A, and making a part of this my report, contains a statement and account of the principal and interest moneys due to the plaintiff as aforesaid, the period of the computation of the interest and its rate.

All which is respectfully submitted.

Dated —.

W. O., Referee.

*Schedule A, referred to in above report:*

One bond, dated —, 18—, in the penal sum of \$—, conditioned to pay \$—, as follows, viz.: on the — day of —, 18—, with interest, which bond is accompanied by a mortgage of the same date:

Principal sum due.....	\$
Interest thereon from —, 18—, to —, being — years and — months, at 7 per centum per annum, is.....	

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Amount due plaintiff this — day of —, 18—, is..... \$

W. O., Referee.

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No. 462.

*The like—where there are no infants or absentees, and the whole amount is not due, and the property cannot be sold in parcels.*

[As in No. 461 to (\*), then add :] and I further report that I have computed and ascertained the amount secured to be paid by said bond and mortgage, both due and to grow due, which yet remains due thereon, and the same, including interest to the date of this report, is the sum of — dollars.

That the schedule hereto annexed marked A, contains a statement of such computations of the amounts due and to become due on said bond and mortgage, showing the period of the computation, and of the interest and its rate.

And I further report that I have ascertained the situation of said mortgaged premises, and find that (\*) they consist of a house and lot, the latter being — feet front, by — feet deep, which cannot be divided, [stating the situation and condition of the property,] and therefore am of the opinion that the premises cannot be sold in parcels.

Schedule B contains the proofs taken by me, except such as are documentary, and of those an abstract is set forth.

All of which is respectfully submitted.

Dated —.

W. O., Referee.

[Annex schedules ; or, both schedules may be embraced in one. Schedule A should be like that in No. 437. Then add :]

Same bond and mortgage.

Principal sum secured and unpaid..... \$

Interest thereon from the — day of —, 18—, to the  
— day of —, 18—, being— years, — months  
and — days.....

Whole amount, principal and interest, secured and unpaid  
up to date of report..... \$

Whole amount due.....

Amount secured and yet to become due, principal and  
interest, to date of report.....

Dated —.

W. O., Referee.

## No. 463.

*The like—where property can be sold in parcels*

[As in No. 461 to the (\*), then add :] they consist of five building lots in the city of ———, no two of them being adjacent to each other; that upon one of such lots, viz. : No. ———, in ——— street, is a dwelling house greatly out of repair, which requires immediate attention, and a considerable outlay of money, in repairs, in order to preserve the same from destruction; that the owner of the equity of redemption is a minor, owning very little property besides the mortgaged premises, and without the means of improving the same; that said house and lot can now be sold for about what it is worth, and the value thereof is nearly or quite sufficient to satisfy said mortgage, and in my opinion should be first exposed for sale. That said lot No. ———, in ——— street, a portion of said mortgaged premises, is in a part of said city where property does not very rapidly appreciate in value, and can now be sold to advantage, there being two or three persons desirous of purchasing the same, and for these reasons, it should, in my opinion, be next exposed for sale, the proceeds of which, together with the proceeds of the sale of the first mentioned lot and dwelling house, will, in my opinion, be more than sufficient to satisfy the plaintiff's claim, with interest and costs. [State any facts as to the relative situation and value of the several lots, bearing upon the question of the order of sale.] And as to the residue of said lots, while the same are very likely to appreciate in value, yet no facts appear to show why the immediate sale (should it become necessary) of any one would be more beneficial to the parties interested than of another.

All of which is respectfully submitted.

Dated ———.

W. O., Referee.

## No. 464.

*The like—where there are infants or absentees.*

[As in No. 461, if whole amount is due. If the whole amount is not due, then as in No. 462, adding this clause after the (†):] And I further report that I have taken proof of the facts and circumstances stated in the complaint, and have examined the plaintiff on oath, as to any pay-

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ments which may have been made to him, or to any person for his use, on account of the demand mentioned in the said complaint, and which ought to be credited thereon; and such proofs, except those which are documentary, and such examinations, are to this my report annexed; and I am of opinion that the matters and circumstances stated in said complaint are true.

All of which, etc.

Dated ———.

W. O., Referee.

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No. 465.

*Order referring issues of fact, joined as to one defendant.*

At a special term, etc.

[*Title of cause.*]

On reading and filing stipulation and consent of the attorneys for the plaintiff, and for the defendant E. F. [or, *on reading and filing affidavit of ———, and it appearing that the trial of this cause will involve the examination of a long account,*] on motion of J. C., attorney for the plaintiff; it is *ordered*, that the issues joined in this action, on the complaint, and the answer of the defendant E. F. be, and the same hereby are referred to W. O., Esq., of ———, to hear and determine the same.

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No. 466.

*Order directing reference to same referee under Rule 71, as against defendants not answering.*

At a special term, etc.

[*Title of cause.*]

On reading and filing proof that none of the defendants in this action are absentees [*except ———, if any there be;*] that E. F., one of the defendants, is an infant; that the summons has been served more than twenty days since, on all the defendants, and that none of them have answered or demurred, except the said E. F., who has put

in the usual general answer by his guardian, not controverting any material allegation of the complaint, and except the defendant G. H., who has put in an answer, the issue joined upon which has been referred to W. O., Esq., referee, to hear and determine; now, therefore, on proof of due service of notice of this motion on such of the defendants as have appeared, and on motion of J. C., attorney for the plaintiff, it is *ordered*, that it be referred to the same referee, W. O., Esq., to compute and ascertain the amount due to the plaintiff for principal and interest on the bond and mortgage mentioned in said complaint; to take proof of the facts and circumstances set forth in said complaint, and to examine the plaintiff, or his agents on oath, as to any payments which have been made to him or for his use, and which ought to be credited on said bond and mortgage, [*if the whole amount is not due, and there are infants or absentees, insert the clauses proper in such cases, as in No. 460;*] and that said referee report the facts [*with the proofs and examinations taken by him, except such as are documentary, and of those an abstract,*] together with his report upon the issues of fact so joined on the said answer of said defendant G. H., which were referred to him to hear and determine.

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No. 467.

*Referee's report on both orders.* (Nos. 465, 466.)

[*Title of cause.*]

To the Supreme Court of the state of New York.

I, W. O., the referee to whom it was referred to hear and determine the issues joined in this action, upon the complaint and the answer of G. H., one of the defendants, bearing date the —— day of ——, 18—, and to whom is was also referred to compute and ascertain the amount due on the bond and mortgage mentioned in the complaint, [*and to examine the plaintiff on oath, etc., stating the substance of the order,*] as to the other defendants, by an order bearing date the —— day of ——, 18—, respectfully report :

That having been attended by the counsel for the respective parties, and having heard and duly examined and considered the evidence produced, and the arguments of counsel thereon, I find the following facts: that said defendant, C. D., on the —— day of ——, 18—,

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executed his bond, etc., [*state the facts as to the execution of the bond and mortgage, dates, amounts, etc.*] that the said bond and mortgage were given to secure the repayment of a loan of money, made by the said plaintiff to the defendant, C. D., at the date and of the amount, mentioned in said bond; that said bond did not reserve, nor did the said plaintiff take or receive for the loan or forbearance of said money, any greater sum than at the rate of seven per centum per annum; and that no part of said sum, principal or interest, has been paid.

I further find, as conclusions of law from the above facts, that the plaintiff is entitled to the relief demanded in the said complaint, to wit, the foreclosure of the mortgage, and the sale of the premises, mentioned in said complaint, for the payment and satisfaction of his said debt. And I further report that I have computed and ascertained the amount due on said bond and mortgage, etc., [*continue as in Nos. 461, 462, or No. 464, as the case may require.*]

All which is respectfully submitted.

Dated ———.

W. O., Referee.

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No. 468.

*Decision of the judge, on issue of fact tried by the court.*

At a special term, etc.

[*Title of cause.*]

This cause having been brought on for hearing and trial before the court, without a jury, on the issues of fact joined therein, and the proofs and allegations of the respective parties, and arguments of counsel thereon having been heard and duly considered; I do decide and find as the facts, established by the evidence, as follows:

That said defendant, C. D., on the ——— day of ———, 18—, executed his bond, etc., [*as in No. 467.*]

And I further decide and find, as conclusions of law, [*continuing as in No. 443.*]

Dated ———.

J. P., Justice of supreme court.

No. 469.

*Judgment for foreclosure and sale, on default—whole amount due.*

See Vol. II., p. 183, and note 27.

At a special term of the supreme court of the state of New York, held at the court house in —, in the county of Saratoga, on the — day of —, 18—.

Present: Hon. J. P., justice.

SUPREME COURT.—County of —.

<p style="text-align: center;">A. B.</p> <p style="text-align: center;"><i>against</i></p> <p>C. D., E. F., etc., [<i>giving the names of all the defendants in full.</i>]</p>
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The summons in this action having been served on all the defendants, personally, [*except the defendant E. F., on whom service was made pursuant to an order of the court, by publication of the same, and service of copy summons and complaint by mail, as therein directed,*] and the time for answering having expired, and no demurrer or answer having been put in on behalf of any defendant, [*except as to the defendant, G. H., who is an infant, and has put in the usual general answer by his guardian ad litem, which does not deny any material facts in the complaint alleged.*]

Now on reading and filing the affidavit of J. C., attorney for the plaintiff, proving all the things necessary to be proven by affidavit, and especially such service of summons and complaint, and the default of the defendants, and that the complaint in this action was duly filed and due notice of the pendency of said action was duly filed and recorded in the office of the clerk of the county of —, on the — day of —, one thousand eight hundred and —, and an order of reference having been made to compute the amount due to the plaintiff upon the bond and mortgage set forth in the complaint; [*and to take proof of the facts and circumstances stated in the complaint, and examine the plaintiff, or his agent, on oath, as to any payments made, and which ought to be credited on said bond and mortgage;*] and on reading and filing the report of the referee named in the order of reference, by

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which report, bearing date the —— day of ——, 18—, it appears that —— dollars was due thereon at the date of said report; (\*) and on motion of J. C., attorney for the plaintiff, it is *adjudged* that the mortgaged premises described in the complaint in this action, as hereinafter set forth, or so much thereof as may be sufficient to raise the amount due to the plaintiff for the principal, interest and costs, and which may be sold separately without material injury to the parties interested, be sold at public auction at the ——, in —— county of ——, by or under the direction of W. O., of ——, who is hereby [or, *was heretofore*] appointed referee for that purpose, [or, *by the sheriff of said county,*] that the said referee [or, *sheriff*] give public notice of the time and place of such sale, according to law and the rules and practice of this court; that either or any of the parties to this action may purchase at such sale; that the said referee [or, *sheriff*] execute to the purchaser or purchasers, a deed or deeds of the premises sold; that out of the moneys arising from such sale, after deducting the amount of his fees and expenses on such sale, and any lien or liens upon said premises so sold, at the time of such sale, for taxes or assessments, the said referee [or, *sheriff*] pay to the plaintiff or his attorney the sum of —— dollars, his costs and charges in this action, with interest from the date hereof, which are hereby adjudged to the plaintiff, to be adjusted by the clerk of the county of ——, and also the amount so reported due (†) as aforesaid, together with the legal interest thereon, from the date of the said report or so much thereof as the purchase money of the mortgaged premises will pay of the same, take a receipt therefor, and file it with his report of sale; [*if there are prior incumbrancers who have been made parties, and the amount of whose liens is ascertained or admitted, add a provision for paying them, before paying the amount of the mortgage debt;*] and that he bring the surplus (if any) into court, and deposit the same with the treasurer of the said county of ——, [or, *in the —— bank of ——,*] to the credit of the parties entitled thereto in this action, and subject to the further order of the court, and take a receipt for the same, to be annexed to and returned with his report of sale. That said referee [or, *sheriff*] make a report of such sale and file it with the clerk of this court with all convenient speed; that if the proceeds of such sale be insufficient to pay the amount so reported due the plaintiff with the interest and costs as aforesaid, the said referee [or, *sheriff*] specify the amount of such deficiency in his report of sale, and that the defendant, C. D., [*mortgagor*] pay the same to the plaintiff, and that the plaintiff have



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execution therefor, (†) and that the purchaser or purchasers at such sale, be let into possession on production of the referee's [or, *sheriff's*] deed and a certified copy of the order confirming the report of sale, [or, *the certificate of the clerk of the county of ———, that said report has been filed in his office eight days, and no exceptions thereto have been filed.*] And it is further *ordered* and *adjudged* that the defendant and all persons claiming or to claim from or under them, or any or either of them, and all persons having a lien subsequent to such mortgage, by judgment or decree, upon the land described in said mortgage, and his or their heirs and personal representatives, and all persons having any lien or claim by or under such subsequent judgment or decree, and their heirs and personal representatives, and all persons claiming under them, be forever barred and foreclosed of and from all equity of redemption, and claim of, in and to said mortgaged premises and every part and parcel thereof. (§)

The following is a description of the mortgaged premises hereinbefore mentioned. [*Insert description as contained in the mortgage.*]

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No. 470.

*The like—where a part only of the mortgage debt is due, and the premises can be sold in parcels.*

[*As in No. 469 to (\*), then add:*] and that the amount secured by, and unpaid upon, said bond and mortgage, including interest thereon to the date of said report, is the sum of ——— dollars; and that the premises are so situated that the same can be sold in parcels, without injury to the interests of the parties [*if report states any reasons controlling the order of sale, insert them*]; and that it would be more beneficial for the interest of the parties, that the premises should be exposed for sale in the following order, that is to say, that the said referee [or, *sheriff*] should first expose for sale lot No. ———, etc.; then lot No. ———, etc. [*Insert direction for referee to sell in that order; then continue, as in No. 469 from the (\*) to the (§), concluding as follows:*] And it is further *adjudged* that the said plaintiff be at liberty, at any time hereafter, as any instalment of principal or interest shall become due on said bond and mortgage, to go before the said referee, who is hereby continued referee for that purpose, under and in pursuance of

this judgment, and obtain a report of the amount which shall then be due; to the end that upon the coming in and confirmation of such report, a judgment may be made, for a sale of the residue of the said premises not sold under this judgment, to satisfy the amount which shall then be due, with interest, and the costs of such report and sale. And in case the said premises shall all be sold, under this judgment, to satisfy the amount now actually due, with interest and costs, it is further *ordered* that then the said plaintiff be at liberty, at any time thereafter, when any future instalment of principal or interest shall fall due upon the said bond and mortgage, to apply to this court for an execution against said defendant, C. D., who is personally liable for the payment of the debt secured by the said mortgage, for the amount which shall then be due, with interest and the costs of such application.

The description and particular boundaries of the property authorized to be sold under and by virtue of this judgment, are as follows, viz.: [*insert description, as in the mortgage.*]

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No. 471.

*The like—after trial of issues of fact by the court and an order of reference made.*

At a special term [*as in No. 469.*]

[*Title of cause.*]

The issues in this cause having been tried by the court, without a jury, and the written decision of the justice holding said court having been made, bearing date the — day of —, 18—, and duly filed, and an order of reference thereon made, bearing date —, 18—, duly entered, and the report of the referee thereon, dated —, made and filed, by which it appears that the whole amount of the debt secured by said bond and mortgage is due, and amounted to the sum of — dollars, at the date of said report [*or, if part only is due, state the same as in No. 469 or No. 470, according to the facts.*]

Now, therefore, on due proof that the complaint and notice of the pendency of this action were filed on the — day of —, 18—, in the office of the clerk of — county, and of the service of due notice of hearing, on all the defendants, on motion of J. C., of counsel for

the plaintiff, and after hearing A. P., of counsel for the defendant C. D., no one appearing for any other defendant; it is *adjudged*, etc. [*as in preceding forms.*]

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No. 472.

*The like—after trial by referee, and after a reference as to other defendants, report and exceptions.*

At a special term, etc.

[*Title of cause.*]

This action having been brought on for hearing, upon the pleadings and proceedings therein, including the report of the referee, made pursuant to an order of reference, referring to W. O., Esq. the issues of fact joined on the answer of C. D., to hear and determine, and also [or, a subsequent order referring it to the same referee] to compute the amount due on said bond and mortgage, etc. which report was filed on the — day of —, 18—; and the exceptions to said report, made and filed on behalf of the defendant C. D.; and due proof having been filed, of the filing of the complaint and notice of *lis pendens* in the office of the clerk of — county, on the — day of —, 18—, and of the service of the summons in this action, on all the defendants, more than twenty days since, and that no demurrer or answer has been put in on behalf of any of the defendants, except C. D., the issue joined on which was so referred to said referee as aforesaid.

Now, therefore, on the coming in of said report, with the exceptions thereto, and after hearing counsel for the respective parties, on motion of J. C., attorney for the plaintiff, it is *adjudged*, that the report of the said referee be, and the same hereby is, in all things ratified and confirmed, and that the said exceptions be overruled and disallowed, [or, that the — and — of said exceptions be, and the same hereby are, overruled, and the — exception is allowed; and that said report be modified accordingly, by reversing the finding of said referee on the matter so excepted to in the — exception, that is to say, by disallowing, etc. State the amendment and modification;] and that said report, as so modified, be ratified and confirmed.

And it is further *adjudged*, etc.

## No. 473.

*The like—after verdict as to a part, and a reference and report as to others, of the defendants.*

At a special term, etc.

[*Title of cause.*]

This action having been brought on for hearing upon the verdict of the jury rendered upon the issues of fact made and settled therein, and submitted to said jury, and proof having been made and filed of the service of the summons in this action, upon all the defendants, more than twenty days since, and personally on all, [except the defendant G. H., who is an absentee, and the unknown owners, who have been served by publication, pursuant to an order heretofore made in said action for that purpose,] and that no demurrer or answer has been put in on behalf of any defendant, except the defendant J. K., [and also the defendant L. M., who is an infant, and has put in the usual general answer, by his guardian ad litem, not controverting any material allegation in the complaint,] and that the complaint and due notice of the pendency of this action were filed on the — day of —, 18—, in the office of the clerk of — county, where the mortgaged premises are situated.

Now, therefore, on reading and filing the said proofs, and on the pleadings and proceedings in this action, including the said verdict, together with the report of W. O., Esq., referee therein, appointed by an order of the court bearing date —, whereby it appears that the amount secured by, and unpaid upon, said bond and mortgage, principal and interest, to the date of said report, is the sum of — dollars; and that the said premises are so situated that the same can be sold in parcels. [Or, \*cannot be sold in parcels without injury to the interests of the parties, for the reasons set forth in said report.] On motion of J. C., attorney for the plaintiff, on due proof of notice to all the parties who have appeared, and after hearing counsel for said defendant, G. H., it is *adjudged*, etc., [as in preceding forms.]

## No. 474.

*The like—after a trial by the court, or verdict of a jury, where the court has  
.. taken proof of all the necessary facts.*

At a special term, etc.

[*Title of cause.*]

This cause having been brought on for hearing, and tried on the issues of fact joined upon the complaint and the separate answer of E. F., one of the defendants, and the written decision of Hon. —, the justice holding said term [or, *the verdict of the jury by whom the issues of fact joined thereon were tried,*] having been filed, and due proof being made of the filing of the complaint, and a notice of the pendency of the action, on the — day of —, 18—, in the office of the clerk of — county, where the mortgaged premises are situated, and of service of the summons in this action more than twenty days since, on all the defendants personally, [*except, etc.*] and that no demurrer or answer has been put in on behalf of any of the defendants, except the said defendant E. F., [*and except also the infant defendants L. M. and N. O., who have put in the usual general answer, by their guardian ad litem,*] and the court having taken the proofs and examinations required by the 71st rule of this court, from which it appears that there is due on the bond and mortgage mentioned in the complaint, for principal and interest, the sum of — dollars, and that there remains secured thereby and unpaid, the sum of — dollars; and that the mortgaged premises are so situated that the same cannot be sold in parcels; on motion of —, etc. [*as in No. 474 to the end.*]

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No. 475.

*Judgment for deficiency, against a mere surety.*

[*As in No. 469 to the (‡), then add:*] and it is further *adjudged*, that if the plaintiff is unable to collect the amount of such deficiency, out of the estate of the said [*mortgagor*] upon the issuing of an execution against his property, to the sheriff of the county in which he resides, or of the county where he last resided, in this state, the defendant [*the surety,*] upon the return of such execution unsatisfied, pay so much of such deficiency as the proceeds of the sale herein before directed,

and the amount, if any, shall have been collected of the said [*mortgagor* etc.,] personally [subsequent to the assignment by said surety to the plaintiff,] exclusive of the costs and expenses of the foreclosure and sale, shall be less than the principal [*or, other limit of surety's liability*] and the interest thereon from the time of the commencement of this action to the time of such sale; with the interest on that part of the deficiency, from the time of said sale, until it shall be so paid by them.

And it is further *adjudged* that if the said [*surety*] pays the amount thus decreed against him personally, or if the same is collected out of his property, he shall have the benefit of this judgment against the said [*mortgagor, etc.,*] for the purpose of enabling him to obtain remuneration from the latter to the same extent, with interest, but no further; either by a new execution against his property, or by bringing an action thereon, as he may think proper. [*Conclude as in No. 469.*]

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No. 476.

*Referee's report of sale in foreclosure suit.*

See Vol. I, p. 525; 2 id. 185, and note 30. See also Forms Nos. 284 to 295.

[*Title of cause.*]

To the —.

In pursuance and in virtue of a judgment of this court, made in the above action at a special term thereof, held at the court house in —, before Hon. —, one of the justices of this court, and bearing date the — day of —, in the year 18—, by which it was, among other things, ordered and adjudged, that all and singular the mortgaged premises mentioned in the complaint in this cause, and hereafter described, or so much thereof as might be sufficient to raise the amount reported due to the plaintiff as therein mentioned for principal and interest, and the costs in this case, and which might be sold separately without material injury to the parties interested, be sold at public auction, by or under the direction of the undersigned, as referee; that the said sale be made in the county where the said mortgaged premises, or the greater part thereof, are situated; that the referee give public notice of the time and place of such sale, according to the course and practice of this court, and that the plaintiff, or any of the parties of this cause, might become the purchaser; that the referee execute a

deed to the purchaser of the mortgaged premises on the said sale; and that the said referee pay to the said plaintiff or his attorney out of the proceeds of the said sale, his costs in this suit to be taxed and also the amount so reported due as aforesaid, together with legal interest thereon from the date of said report, or so much thereof as the purchase money of the mortgaged premises would pay of the same, and that the referee take receipts for the amounts so paid, and file the same with his report; and that he retain the surplus moneys arising from the sale, if any there should be, in his hands, to abide the further order of the court. And whereby it was further ordered and adjudged, that if the moneys arising from the said sale should be insufficient to pay the amount so reported due to the plaintiff, with the interest and costs as aforesaid, that the said referee specify the amount of such deficiency in his report of the sale; I, the subscriber, the referee named in said judgment, residing in —, in the county of —, do respectfully certify and report, that having been charged by the attorney for the plaintiff with the execution of said judgment, I advertised said premises to be sold by me at public auction, at the —, in —, on the — day of —, in the year 18—; that previous to said sale, I caused notice thereof to be publicly advertised for six weeks successively, as follows, viz.: by causing a printed notice thereof to be fastened up in three of the most public places in the county where such premises were to be sold, and three notices fastened up in the — in which the said mortgaged premises are situated, and by causing a copy of such notice to be printed once in each week during the six weeks immediately preceding said sale, in a public newspaper printed and published in the said county of —, which notices contained a brief description of the said mortgaged premises.

And I do further report, that on the said — day of —, in the year 18—, the day on which the said premises were so advertised to be sold as aforesaid, I attended at the time and place fixed for said sale, to wit: at —, and exposed said premises for sale at public auction to the highest bidder; and the said premises were then and there fairly struck off to J. K., he being the highest bidder therefor, and that being the highest sum bidden for the same. [*If the premises were sold in more than one parcel, vary this statement accordingly.*]

And I do further certify and report, that I have executed, acknowledged and delivered to said purchaser the usual referee's deed for said premises, and have paid over or disposed of the purchase moneys, or proceeds of said sale, as follows, viz.: I have paid to the attorney for

the plaintiff the sum of — dollars, being the amount of his costs of this suit, with the interest, as adjusted, and have taken a receipt therefor, which is hereto annexed.

I have also retained in my hands the sum of — dollars, being the amount of my fees, commissions and disbursements on said sale, as will appear by reference to the statement of items thereof, annexed to this my report, and to which I refer. And I have paid to the attorney for the plaintiff the sum of — dollars, being the full amount of principal and interest due to the said plaintiff, on the judgment in this action, and have taken a receipt therefor, which is hereto annexed; and have paid the balance in hand, viz.: the sum of — dollars, to the treasurer of the county of —, [or, to the chamberlain of the city of New York,] and taken his receipt therefor, which is also hereto annexed. [If there is a *deficiency*, instead of the last sentence, say:] That I have paid to the plaintiff, through his attorney, the whole of the residue, viz.: the sum of — dollars; and have taken a receipt therefor, which is hereto annexed. And I also report that the deficiency due to the said plaintiff, from the defendant C. D., and for which the latter is personally liable, under the judgment herein, is the sum of — dollars, with interest from the date of this my report.

[I do also report that I have let the said J. K. into the possession of said premises.]

I do further certify and report that the premises so sold and conveyed by me as aforesaid were described in said judgment, and in the deed so executed by me, as follows, viz.: [*insert description.*]

All which is respectfully submitted.

Dated —.

W. O., Referee.

(Receipts annexed.)

[*Title of cause.*]

Received, —, 187—, of W. O., the referee who made the sale of the premises under and by virtue of the judgment in the above entitled cause, the sum of — dollars, which sum, being part of the proceeds of the sale of the said premises, is received by me, under and by virtue of the provisions of said judgment, being the full amount adjudged to be paid to said plaintiff, with interest thereon as mentioned in said judgment.

J. C., Attorney for plaintiff.

[*Title of cause.*]

Received, —, 187—, of W. O., the referee who made the sale of the premises under and by virtue of the judgment in the above enti-



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bled cause, the sum of ——— dollars, being the amount of my costs in said cause as taxed, with the interest as taxed, which costs are paid me by said W. O., under and by virtue of the provisions of said judgment.

J. C., Attorney for plaintiff.

*(Statement of referee's fees and disbursements.)*

Paid for advertising..... \$  
Paid for map of premises sold.....  
Referee's fees, etc., etc.....

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No. 477.

*Order confirming report of sale.*

At a special term, etc.

[*Title of cause.*]

On reading and filing the report of W. O., heretofore appointed referee herein, of the sale of the mortgaged premises mentioned and described in the complaint in this action, bearing date the ——— day of ———, 18—, and on motion of J. C., attorney for the plaintiff, *ordered*, that the said report be, and the same is, in all things confirmed, [*unless exceptions thereto be filed within eight days after filing said report.*]

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No. 478.

*Referee's deed in foreclosure suit.*

See No. 296.

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No. 479.

*Forms in proceedings relative to surplus moneys in foreclosure suit.*

See Nos. 269 to 278.

No. 480.

*Execution for deficiency in foreclosure suit.*

See Vol. II., p. 185; id. 186, and note 32.

The People of the State of New York, to the sheriff of the county of  
—, greeting:

Whereas, on the — day of —, 18—, by a certain judg-  
[L. s.] ment, made in the supreme court, and entered in the clerk's  
office of the county of —, in a certain action wherein A. B.  
is plaintiff, and C. D. and E. F. are defendants, it was, among other  
things, ordered and adjudged, that all and singular the mortgaged  
premises mentioned in the complaint in said action, or so much there-  
of as might be sufficient to raise the amount due to the plaintiff, for  
the principal, interest and costs in said action, and which might be  
sold separately, without material injury to the parties interested,  
might be sold at public auction, by and under the direction of W. O.,  
referee appointed for that purpose; and that said referee, out of the  
proceeds of such sale, retain his fees, disbursements and commissions  
on said sale, and pay to the plaintiff or his attorney, his costs in such  
action to be taxed, and also the amount reported due to him upon his  
mortgage, together with legal interest thereon from the date of the  
referee's report of computation in said action, or so much thereof as the  
purchase money of the mortgaged premises would pay of the same;  
and that such referee bring the surplus money arising from such sale,  
if any, into court; and that if the moneys arising from said sale  
should be insufficient to pay the amount reported due to the plaintiff,  
with the interest, and the costs and expenses of such sale, that such  
referee specify the amount of such deficiency in his report of said  
sale; and that on the coming in and confirmation of such report, the  
defendant C. D., who is personally liable for the payment of the mort-  
gage debt, should pay to the said plaintiff the amount of such defi-  
ciency, with interest thereon from the date of the last mentioned re-  
port; and that such plaintiff have execution therefor. And whereas,  
the said referee has filed his report of said sale in the proper office,  
and the same has been duly confirmed by an order of the supreme  
court, from which report it appears that the costs so decreed to be  
paid to the said plaintiff amount to the sum of — dollars, as ad-  
justed, and that the amount of the deficiency upon the sale of the said  
mortgaged premises, over and above the sum for which the said prem-

ises were sold is — dollars. And whereas, the said C. D. has failed to comply with all and singular, the matters required of him in and by the said judgment, and to pay the amount of the deficiency thus reported, with interest, or any part thereof, as we have been informed, in the supreme court.

Now therefore, in order that full and speedy justice may be done, in the premises, we command you, the said sheriff, that of the goods and chattels of the said C. D. in your bailiwick you cause to be made the sum of — dollars, being the amount of the deficiency of moneys arising from the said sale, to pay the amount reported due and adjudged to be paid to the said plaintiff, with the interest and costs as aforesaid. And if sufficient goods and chattels cannot be found in your bailiwick, then that you cause the sum of — dollars, so adjudged to be paid as aforesaid, with interest from the — day of —, 18—, and costs, to be made of the lands and tenements and chattels real of the said C. D., whereof he was seized on the — day of —, 18—, or at any time since, in whosever hands the same may be. And that you return this writ to the office of the clerk of the county of —, within sixty days after the receipt thereof by you.

Witness the Hon. —, one of the justices of the supreme court this — day of —, A. D. 18—.

J. C., Plaintiff's attorney.

## CHAPTER III.

## ACTION FOR STRICT FORECLOSURE OF A MORTGAGE.

No. 481.

*Complaint in action for strict foreclosure.*

See Vol. II., p. 188.

[Commence as in No. 449, and continue down to the (\*,) then add:] And the plaintiff further says that the said defendants have failed to comply with the condition of the said bond and mortgage, in this, to wit, that they have omitted and neglected to pay the sum of — dollars which became due on the — day of —, 18—; and there is now justly due the plaintiff, upon the said bond and mortgage, the sum of — dollars with interest from the — day of —, 18—. That soon after the said mortgage debt became due, as aforesaid, the said plaintiff entered into the possession of the said mortgaged premises, and the receipt of the rents and profits thereof, and has since continued, and still is, in possession. That the said rents and profits, so received by the plaintiff have not been sufficient in amount to equal the annual interest upon the said bond and mortgage [or, *state otherwise, as the fact may be.*] That the plaintiff has laid out considerable sums of money in expenditures for permanent improvements upon said premises [*stating the general nature and value thereof,*] which he claims should be allowed him by way of set-off against so much of the said rents and profits. And he has also paid the sum of — dollars, for taxes and assessments [or, *if any prior lien is discharged, state the nature of the lien, the amount thereof, and when paid;*] all of which sums the said plaintiff also claims should be allowed him, and credited on his account, against so much of said rents and profits; which several sums, when so applied and credited to the said plaintiff, charging him with the amount of rents and profits so received by him, will leave remaining due to him, the said plaintiff, on his said bond and mortgage, as he claims, the sum of — dollars.

The plaintiff further alleges that the defendant E. F. has an interest in said mortgaged premises, under and by virtue of a mortgage thereon, executed by the said defendant C. D., subsequent to the mortgage of the plaintiff, and the defendant G. H. has an interest therein, etc., etc., [*setting forth the interests of the respective parties, in a general manner.*]

That the plaintiff has applied to the said defendant C. D., etc., and requested him [*them*] to pay him, the said plaintiff the said sum so due on his said bond and mortgage, or to come to an accounting with him thereon, for the said rents and profits, permanent improvements etc., and after the proper charges, to pay the said plaintiff what should appear to be due him on his said bond and mortgage; or, in default thereof, to release his [*their*] right and equity of redemption in the said mortgaged premises. But the said defendants have hitherto refused, and still refuse so to do, or to comply with any part of said plaintiff's request.

Wherefore, the plaintiff demands judgment against the defendants, that an account may be taken of what, if anything, is due and owing to the plaintiff for principal and interest on his said bond and mortgage; and that an account may also be taken of the rents and profits of the said mortgaged premises which have been received by said plaintiff, and also of the expenditures of the said plaintiff for permanent improvements, and for taxes and assessments [*or, for the amount so paid for prior incumbrances, etc.;*] and that the said defendants may be adjudged to pay to the plaintiff what may be found due to him, on taking the said account, together with his costs of action, by a short day to be appointed by the court for that purpose; or, in default thereof, that the said defendants, and all persons claiming under them, may be absolutely debarred and foreclosed of and from all right and equity of redemption in and to the said mortgaged premises, and every part thereof; and that said defendants may deliver up to the plaintiff all deeds, papers or writings in their custody or power relating to or concerning the said mortgaged premises or any part thereof, or for such other and further relief in the premises as the court shall think proper to grant, with costs of this action.

J. C., Plaintiff's attorney.

(Verification by plaintiff, as in No. 1.)

No. 482.

*Judgment for strict foreclosure.*

See Vol. II., p. 188, and note 2.

[*Commencement and recitals as in No. 469, etc., then add:*] it is *adjudged* that upon the defendant's paying unto the said plaintiff the amount which is so found and reported due to him, for principal and interest, as aforesaid, with ——— dollars, costs, hereby adjudged to the plaintiff, within [six] months after the entry of this judgment, and service of notice thereof, [with interest thereon from the date of the above mentioned report, until the time of such payment] at [*specifying place and hours for paying*;] that the said plaintiff do reconvey the mortgaged premises to the said defendant, C. D., by a suitable and proper instrument of conveyance, to be approved of by the court in case the parties cannot agree upon the form thereof, free and clear of all incumbrances, done or suffered by him, or by any person claiming by, from or under him [and with the usual covenants against his and their acts;] and that he deliver up all deeds and writings in his custody or power relating thereto, upon oath, to the said defendant, C. D., or to whomsoever he shall appoint. And further, that the said plaintiff cancel and discharge such mortgage of record. But in default of the said defendant's paying unto the plaintiff such principal, interest and costs as aforesaid, by the time limited for that purpose, then it is *adjudged* that the said defendant, C. D., and all persons claiming by, from, or under him, do stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises.

The following is a description and the particular boundaries of the premises hereinbefore mentioned: [*insert description.*]

CHAPTER IV.

ACTION TO REDEEM A MORTGAGE.

No. 483.

*Complaint, in action to redeem mortgaged premises—heirs-at-law of mortgagor against mortgagee in possession.*

See Vol. II., p. 193, and notes.

[*Title of cause.*]

The plaintiff complains of the defendant, and alleges the following facts, constituting his cause of action. (\*)

That J. B., who was the plaintiff's father, was, at the date of the mortgage hereinafter mentioned, and continued to be, to the time of his death, seized in fee simple of a certain piece or parcel of land situate, lying and being [*describing the premises.*] That said J. B., being so seized, on or about the — day of —, 18—, executed to C. D., the above named defendant, a mortgage upon said premises, for securing the payment of the sum of — dollars, with interest, then advanced by said C. D. to the said J. B.

That soon after the making of said security, the defendant entered into the possession of said mortgaged premises, and into the receipt of the rents and profits thereof, and has ever since continued in such possession and receipt.

That said J. B. departed this life on or about the — day of —, 18—, intestate, leaving the plaintiff his sole heir-at-law.

That the plaintiff has applied to said defendant since the death of said J. B., to come to an account of the rents and profits of the said premises so received by him, and to pay over to the plaintiff what he should appear so to have received beyond the amount of the principal and interest due him, and to deliver up the possession of the said mortgaged premises, but the defendant refused and still refuses so to do.

Wherefore, the plaintiff demands that an account may be taken of what, if anything, is due to the said defendant, for principal and

interest on said mortgage; and that an account may also be taken of the rents and profits of the said mortgaged premises which have been possessed or received by said defendant or by his order, or for his use, or which, without his wilful default or neglect, might have been received; and that if it shall appear that the said rents and profits have been more than sufficient to satisfy the principal and interest of the said mortgage, then that the residue may be paid over to the plaintiff; and that the plaintiff may be permitted to redeem said premises, he being ready and willing, and hereby offering to pay what, if anything, shall appear to remain due in respect to the principal and interest on the said mortgage; and that the defendant may be adjudged to deliver up the possession of the said mortgaged premises to the plaintiff, or to such person as he shall direct, free from all incumbrances made by him or by any person claiming under him, and may also deliver over to the plaintiff all deeds and writings in his custody or power, relating to said mortgaged premises; or for such further or other relief as to the court shall seem just.

J. C., Plaintiff's attorney.

(Verification as in No. 1.)

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No. 484.

*The like—mortgagor against mortgagee.*

[As in No. 483 to the (\*), then:] that on the — day of —, 18—, the plaintiff having made to the defendant a bond, under his hand and seal, dated on that day, conditioned to pay [*insert condition of bond,*] and, being owner in fee [*or, otherwise,*] of the premises hereinafter described, made to the defendant a mortgage, of even date therewith to secure the payment thereof, whereby the plaintiff granted, bargained and sold to the defendant the said premises, upon the condition, nevertheless, that [*insert condition of mortgage:*] which said premises are bounded and described as follows: [*insert description as in mortgage.*]

That the plaintiff has paid to the defendant all the interest due on the said mortgage debt from the — day of — 18—, up to the — day of — 18—; and that on the — day of —, 18—, when [*or, and after*] the said mortgage debt became due he tendered to the



defendant the sum of — dollars, together with all interest [and costs] due thereon, and has ever since been ready and willing to pay the same, but the defendant refused to receive the same, or to deliver up said mortgage to be cancelled.

Wherefore, the plaintiff demands judgment, that an account be taken of the amount now due to the defendant on said bond and mortgage, for principal and interest [and costs], and that the plaintiff may be at liberty to redeem said mortgaged premises upon payment of whatever may be found so due, and that the defendant, upon payment thereof, may acknowledge satisfaction of said mortgage, and discharge the same of record. Or for such further or other, etc.

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No. 485.

*The like—lessee against mortgagor and mortgagee.*

[As in No. 483 to the (\*), then:] that on the — day of —, 18—, the defendant C. D. [mortgagor], being the owner in fee of the following described premises, leased the same to the plaintiff by an indenture dated on that day, a copy of which is annexed as a part of this complaint; and that by virtue of the said lease, the plaintiff entered upon, and ever since has been, and still is, in possession of said premises, and is vested with the unexpired term thereof, which premises are [bounded and] described as follows: [insert description.] That on the — day of —, 18—, the said defendant [mortgagor,] made to the defendant E. F. [mortgagee], a mortgage upon the same premises to secure the payment of — dollars, on the — day of —, 18—.

That on the last mentioned day, the said mortgage debt became due, but has not been paid; and that said E. F. [mortgagee] has commenced an action [or, *proceedings under the statute*] to foreclose the said mortgage, for such default.

That on the — day of —, 18—, the plaintiff tendered — dollars to said E. F., being the amount due on said mortgage, with interest, and the costs of said action [or, *proceeding*] up to that time, in redemption of said mortgage, and has ever since been ready and willing to pay the same; and did then request him to assign the same to the plaintiff, but he refused to do so.

Wherefore, the plaintiff demands judgment that he be allowed to redeem the said mortgage upon paying to the defendant E. F. the

amount due upon said mortgage; and that upon such payment, the said defendant E. F., by an assignment duly executed and acknowledged by him, assign said bond and mortgage to the plaintiff. Or for such further or other, etc.

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No. 486.

*Judgment in action for redemption of mortgaged premises.*

At a special term, etc.

[*Title of cause.*]

[*After reciting proceedings, as in previous forms of judgments—Nos. 162 to 178, add:*] Therefore it is *adjudged* that the defendant pay unto the plaintiff — dollars, the amount which is so found and reported due to him for principal and interest, as aforesaid [with — dollars for the value of his said improvements], and with — dollars, costs, hereby adjudged to the plaintiff, within six months after the entry of this judgment, and service of notice thereof [with interest thereon from the date of the above mentioned report, until the time of such payment] at — [*specifying place and hours for paying;*] and that the said defendant do re-surrender the said mortgaged premises unto the said plaintiff, or unto such person or persons as he shall direct, free and clear of all incumbrances, done or suffered by him, or any person claiming by, from or under him, and deliver unto the said plaintiff, on oath, under the direction of the court, if the parties cannot agree in respect thereto, all deeds and writings in his custody or power, relating to the said mortgaged premises. But in default of the said plaintiff's paying unto the said defendant what is so reported to be due to him for principal, interest [improvements] and costs, as aforesaid, it is *ordered* that this action do, from thenceforth, stand dismissed out of this court, with costs.(a)

(a) The decree, on a bill to redeem, should limit a time for redemption, and direct the bill to be dismissed, with costs, if the money is not paid by that time. (*Waller v. Harris*, 7 *Paige*, 167.)

No. 487.

*Affidavit, by mortgagee, of non-payment of money.*

[*Title of cause.*]

— county, ss. C. D., the above defendant, being duly sworn, says : That he has not, nor has any other person or persons on his behalf, at any time heretofore received or been paid the sum of — dollars, or any part thereof, which, by the judgment made in this action on the — day of —, 18—, [and the referee's report, dated —, made in this action pursuant to the said judgment], was ordered and appointed to be paid to this deponent; but that the said sum of — dollars, with interest, now remains due and owing to this deponent upon the mortgage in the said judgment mentioned.

Sworn, etc.

C. D.

---

No. 488.

*Final order dismissing action for redemption.*

At a special term, etc.

[*Title of cause.*]

Upon the judgment in this action, entered on the — day of —, 18—, and on reading and filing due proof of service upon the said plaintiff, more than six months since, of notice of the entry of the same [and of a copy of the bill of costs as settled and adjusted]; and on reading and filing the affidavit of the said defendant, showing that the amount thereby required to be paid has not been paid; but that the whole of the said sum of — dollars still remains due and owing from the plaintiff to the said defendant, for his principal, interest and costs; on motion of A. P., of counsel for the defendant, and on hearing J. C., of counsel for the plaintiff, in opposition, it is *ordered* and *adjudged* that this action be, and hereby is, dismissed, with costs.

CHAPTER V.

PROCEEDINGS BY AND AGAINST INFANTS.

No. 489.

*Petition of infant plaintiff over fourteen, for appointment of guardian ad litem.*

See Vol. II., p. 201, 202, and notes 1 to 4.

To the Supreme Court of the State of New York [or, *to the Hon. —, a Justice of the supreme court.*]

The petition of A. B., an infant, shows : that your petitioner was of the age of — years on the — day of —, last ; that he is the only minor child of C. B. deceased, and resides with his mother at —, and has no general guardian appointed pursuant to law [or, *show what guardianship the petitioner has.*]

That your petitioner has a good cause of action against C. D. of —, for — [*state the nature and object of the suit.*] That your petitioner is desirous of commencing an action in the — court for the recovery of the said [*debt.*]

That G. H. of —, the uncle of your petitioner, is worth, as your petitioner is informed and believes, at least the sum of five hundred dollars, over and above all just debts and liabilities, and is a competent and responsible person to become the guardian of your petitioner, in such action.

Wherefore, your petitioner prays that the said G. H., or some other competent person, may be appointed guardian *ad litem* of your petitioner, to commence and prosecute such action, for your petitioner.

Dated —.

A. B.

— county, ss. A. B., being duly sworn, says : That he has read [or, *heard read*] the foregoing petition subscribed by him, and knows the contents thereof ; and that the same is true of his own knowledge,

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except as to the matters therein stated on information and belief, and as to those matters, he believes it to be true.

Sworn, etc.

A. B.

I hereby consent to become the guardian of A. B., to bring the action above referred to.

Dated —.

G. H.

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No. 490.

*Order upon No. 489.*

SUPREME COURT.

In the matter of the petition of A. B., an infant, for the appointment of a guardian <i>ad litem</i> .
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At a special, term etc., [*if made by court.*]

On reading and filing the annexed petition of A. B., for the appointment of G. H. as his guardian *ad litem*, in a suit (\*) about to be commenced by him, against C. D., and the consent of said G. H. to act as such guardian, and it being made satisfactorily to appear to the court that G. H. is a competent and responsible person; *ordered* that said G. H. be and hereby is, appointed guardian *ad litem* of A. B., the infant above named, and authorized to prosecute, for him, as such guardian, the action mentioned in the annexed petition.

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No. 491.

*Petition by general guardian, or relative, or friend, for appointment of guardian ad litem for infant plaintiff under fourteen.*

To the [Supreme] Court of the State of New York.

The petition of J. K. respectfully shows: That your petitioner is the testamentary guardian of A. B., an infant under fourteen years of age, duly appointed by the will of C. B., his father [or, *is the general*

guardian of A. B. an infant under the age of fourteen years, duly appointed such by the order of C. W. surrogate of the county of —, on the — day of — 18—; or, is the father, (or other relative) of A. B. an infant under the age of fourteen years.]

That the said A. B. was — years old on the — day of — last, and resides at —, with —. That the said infant, as petitioner is informed and believes, has a good cause of action, against —, for [state cause of action.] That your petitioner is desirous of bringing an action against the said —, to recover the amount due on the foregoing facts [or, to foreclose the said mortgage, etc.,] on behalf of said A. B.

[If the petitioner seeks the appointment of himself, add:] That your petitioner is willing to become the guardian *ad litem* of the said A. B.; and that he is worth five hundred dollars, over and above all his debts and liabilities and property exempt by law from execution.

Wherefore, your petitioner asks that he may be appointed [or, that —, who resides at — in this state, and who is a competent and responsible person, and worth — dollars over all his debts and liabilities, and property exempt by law from execution, may be appointed] guardian *ad litem* of said A. B., to prosecute said action for him.

[Verification.]

J. K.

[If the proposed guardian is a person other than the petitioner, add his consent; also proof of signature, unless he be an attorney.]

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No. 492.

*Notice of foregoing application.*

[Title as in No. 490.]

Take notice that on the annexed petition [consent and affidavits] an application will be made to this court, at a special term thereof, to be held at —, on the — day of —, 18—, at — o'clock in the forenoon, for an order appointing J. K., guardian *ad litem* of A. B., the infant above named, and authorizing him to prosecute the action referred to in said petition.

Dated —.

[Signature.]

To [general or testamentary guardian of infant, if any; if not, then to person with whom he resides.]

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No. 493.

*Petition by infant defendant, for appointment of a guardian ad litem.*

See Vol. II., p. 208, and note 13

[*Title of cause.*]

To the Hon. —, one of the justices of said court.

The petition of E. F., one of the defendants above named, respectfully shows :

That an action has been commenced against your petitioner [and others], by A. B. for [*state the object of suit.*] That your petitioner is an infant of the age of — years, on the — day of — last, and resides with —, at —; and that G. H. is his general guardian. That twenty days have not elapsed since the service of the summons upon the petitioner, [or, that no application for the appointment of a guardian *ad litem* to appear on behalf of your petitioner, in said action, has been made, to the best of your petitioner's knowledge and belief.

Wherefore your petitioner asks that L. M. may be appointed his guardian *ad litem*, to appear and defend said action, on his behalf.

Dated —.

E. F.

[*Verification, consent of proposed guardian, and proof of competency, as in preceding forms.*]

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No. 494.

*Order appointing guardian ad litem for infant defendant.*

[*As in No. 490 to (\*), then add.:*] brought against him [*and others*] for the appointment of G. H., as his guardian *ad litem*, and the consent of said G. H., [and it being made satisfactorily to appear to the court that said G. H. is a competent and responsible person; *ordered*, that G. H. be, and hereby is, appointed guardian *ad litem* for the petitioner, and authorized and directed to appear and defend on his behalf, the action mentioned therein.

## No. 495.

*Petition by relative, or friend, of infant defendant, for appointment of guardian ad litem.*

[*Title of cause.*]

To the [Supreme] Court [or, to the Hon. —, a justice of the supreme court] of the state of New York.

The petition of E. D. shows, that the above entitled action has been commenced by the service of a summons upon C. D., one of the above named defendants. That the object of the action is [*state it, concisely.*] That the said C. D. is an infant — years old on the — day of — last, [and, if he is over fourteen years of age, add: *and has neglected to apply for the appointment of a guardian ad litem in this action.*] That he resides with the petitioner, who is his [father] and that he has no general guardian [or, *otherwise, as the case may be.*]

Wherefore your petitioner asks that a guardian *ad litem* be appointed, to appear and defend said action, on behalf of such infant.

E. D.

(Add verification, consent, etc., as in No. 489.)

## No. 496.

*Notice to infant defendant, or his guardian, that plaintiff will apply.*

[*Title of cause.*]

Take notice, that unless you procure the appointment of a guardian *ad litem*, to appear and defend this action on your behalf, within twenty days from the service of the summons herein upon you [or, *unless the defendant E. F. procures the appointment of a guardian ad litem to appear and defend this action on his behalf, within twenty days from the — day of —, 18—, the date of the service of the summons herein upon him,*] an application will be made to this court, at a special term thereof, to be held [or, to the Hon. —, a justice of this court] at —, on the — day of — next, at — o'clock in the —noon, for an order appointing some suitable and competent person guardian *ad litem* for you [or, *for the said infant defendant, E. F.,*] and authorizing and directing him to appear and defend the above action



in your behalf [or, *in behalf of the said defendant, E. F. ;*] and for such other and further relief as may be just.

Dated —.

J. C., Plaintiff's attorney.

To E. F., one of the defendants, [or, *J. K., general (or testamentary) guardian of defendant, E. F.*]

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No. 497.

*Affidavit of service of above notice.*

[*Title of cause.*]

— county, ss. R. S., being duly sworn, says, that he is the attorney [or, *managing clerk in the office of the attorney*] of the plaintiff in this action. That on the — day of —, 18—, at —, he served a notice of which the annexed is a copy, upon J. K., the general [or, *testamentary*] guardian within this state, of the infant E. F., therein named, [or, *that the infant E. F., therein named was over fourteen years of age, on the — day of —, 18—, and then had no general or testamentary guardian within this state ;*] and that on the — day of —, 18—, at —, this deponent served a notice of which the annexed is a copy, on said infant, by delivering the same to him personally, [or, *that said infant is under fourteen years of age, and residing at —, within this state, with his mother C. F. ; and that on the — day of —, 18—, deponent served a notice of which a copy is hereto annexed, on said C. F., by delivering the same to her personally.*]

Deponent further says, that twenty days have elapsed since service of such notice, but said infant has not appeared, and no application has been made by him, or on his behalf, for the appointment of a guardian *ad litem*, to the best of this deponent's knowledge and belief.

Sworn, etc.

R. S.

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No. 498.

*Order upon failure of infant defendant to procure appointment of guardian ad litem.*

[*Title of cause.*]

On reading and filing the annexed notice, proof of service, and of an application on the part of the infant defendant E. F., for the

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appointment of a guardian *ad litem*, and on motion of J. C., counsel for the plaintiff, (\*) *ordered*, that — be, and hereby is, appointed guardian *ad litem* of the infant defendant E. F. in this action, and is authorized and directed to appear and defend the same on his behalf, as such guardian.

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No. 499.

*Order nisi, appointing guardian ad litem for infant defendant.*

At a special term, etc.

[*Title of cause.*]

On reading and filing the petition of A. B., dated —, for the appointment of a guardian *ad litem* for the infant defendant E. F., and on motion of J. C., of counsel for the plaintiff; *ordered*, that O. P. be appointed guardian *ad litem* of the said infant defendant E. F.; unless, within ten days after service of a copy of this order upon said E. F., he procures a guardian *ad litem* to be appointed.

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No. 500.

*Affidavit of service of order nisi, and of default.*

[*Title of cause.*]

— county, ss. R. S., being duly sworn, says, that he is the attorney [or, *managing clerk in the office of the attorney*] of the plaintiff. That on the — day of —, 18—, a certified copy of the annexed order was duly served on E. F., the infant therein named [as appears by the annexed affidavit of —,] and that although more than ten days have elapsed since the service of said order upon him, no application has been made on his behalf, for the appointment of a guardian *ad litem*, to the best of deponent's knowledge and belief.

Sworn, etc.

R. S.

No. 501.

*Order absolute on Nos. 499, 500.*

[As in No. 498 to (\*), then add:] ordered, that the order of the — day of —, 18—, be made absolute; and that the said O. P. be, and hereby is, appointed guardian *ad litem* for the infant defendant E. F., and is authorized to appear and defend this suit for him, as such.

No. 502.

*Petition for appointment of guardian ad litem for non-resident infant defendant.*

See Vol. II., p. 208, and note 13; Code, § 116, sub. 2.

[*Title of cause.*]

To the [Supreme] Court of the State of New York.

The petition of A. B., the plaintiff in this action, shows, that said action is brought for the partition of [or, *foreclosure of a mortgage upon*] real estate situated in the county of —; that the defendant E. F. is a necessary or proper party thereto, but is an infant under the age of twenty-one years, and resides without the state, to wit, at —, in the state of — [as your petitioner is informed by G. F., the brother of said infant, and verily believes.] That there is no regular communication by mail with that place; [or, resides without this state, but the place of his residence is not known to and cannot on due inquiry be ascertained by the petitioner, although he has diligently made such inquiry, [stating how.]

That this action was commenced by service of the summons upon — [or, *by order for the service of summons upon said infant by publication, made by this court on the — day of —, 18—, and the first publication of the same was made on the — day of —, 18—.*] That no appearance by, or on behalf of, said infant, and no application for the appointment of a guardian *ad litem*, by him or on his behalf, has been made, to the best of your petitioner's knowledge and belief.

Wherefore, your petitioner asks that some suitable and competent person be appointed guardian *ad litem* for said infant defendant, and be authorized and directed to appear and defend the action on his behalf; and for such other and further relief as may be just.

[*Verification.*]

A. B.

No. 503.

*Order thereon.*

At a special term, etc.

[*Title of cause.*]

On reading and filing the petition of A. B., the plaintiff in the above entitled action, setting forth, among other things, that E. F., one of the above named defendants, is a non-resident infant, and that no guardian has been appointed for him, in this action, and praying that a guardian for such infant may be appointed; on motion of J. C., plaintiff's attorney, it is *ordered* that R. F., of —, counsellor at law, may be appointed guardian *ad litem* of said infant defendant, for the purposes of this action; unless the said defendant, or some one on his behalf, within twenty days after service of a copy of this order, in the manner herein directed, procure a guardian *ad litem* to be appointed, and give notice thereof to the plaintiff's attorney.

It is *further ordered* that this order be served on the said infant, either by personal service upon —, the mother of said infant, with whom he resides, or by depositing a copy thereof in the post office at —, properly inclosed in an envelope, with postage prepaid, and directed to said —, at her place of residence, to wit, —, etc., [or, *specifying such other mode of service as the court shall direct;*] and that such guardian execute to the people of this state, and duly file a bond in the penalty of — dollars, [*amount to be fixed by the court,*] and with — sureties, to be approved by a justice of this court, conditioned for the faithful discharge of the trust committed to such guardian, and to render a just and true account of his guardianship, in all courts and places, when thereunto required. [*If the clerk is appointed, this last clause may be omitted.*]

No. 504.

*Petition for sale of infant's real estate.*

See Vol. II., p. 211, and note 15.

To the Supreme Court of the State of New York.

The petition of A. B., an infant of the age of fourteen years, and M. B., an infant under the age of fourteen years, by R. B., their

mother and next friend, respectfully shows: that your petitioner, A. B., is an infant of the age of eighteen years and upwards, and resides at the village of —, in the county of —, and state of —, and has no general guardian. That your petitioner M. B. is an infant of the age of eleven years and upwards, and resides at the village of —, aforesaid, with the said R. B., and has no general guardian; that the said infants are two of the children and heirs-at-law of T. B., late of the said village of —, and county of —, deceased. That as such heirs-at-law, they are each entitled to an undivided fourth part, subject to the right of dower of their mother, the said R. B., of a lot of land situated in the town of —, in the county of —, and state of New York, which said premises, or the interests of your petitioners therein, whereof leave to sell is herein asked, are bounded and described as follows: [*insert description.*]

That the said lot of land is worth about — dollars, and produces an annual income of — dollars, [*or, is wholly unproductive, and yields no income.*] That the reasons which render a sale of the said premises necessary or proper, are as follows: S. B. and W. B., the brothers of your petitioners, own the other three-fourths of the above described lot of land, and threaten to commence proceedings against your petitioners, for the partition thereof. That your petitioners do not own any real estate other than that above described, and that they have no personal estate of any kind, or to any amount whatever, except their necessary wearing apparel, [*or, if they own any other property, describe it, and state its value;*] and that the property, real and personal, above mentioned, is the only property owned by your petitioners, or in which they have any interest.

That the said R. B., as the widow of the said T. B., deceased, the father of said infants, is entitled to dower in the real estate above described, and that she has no means of support for herself and her said infant children, except what they may acquire by their industry; that it is necessary the said premises, or some part thereof, should be sold, and the proceeds, or some part thereof, be applied towards the necessary maintenance and education of said infants.

And the said R. B. hereby offers to unite in the sale of said premises, and to release her right of dower therein, upon condition that one-third of the purchase money be securely invested, and the annual interest thereof be paid to her during her natural life [*or, that a gross sum be paid to her in lieu thereof, equal in value to her life estate therein, to be ascertained upon the principles of life annuities.*]

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Your petitioners therefore pray that the real estate above described may be sold by and under the direction of this court; that V. B., of the city of —, who is the uncle of, [or, *in no way related to*] the said infant petitioners may be appointed their special guardian for the purpose of selling their interests in the said real estate, and that all such proceedings may be had in the premises as may be proper and necessary for that purpose; and J. K. and L. M. of —, are proposed as sureties for the said V. B. as such special guardian, to join with him in a bond in such penalty and upon such conditions as may be required.

Dated the — day of —, 18—.

A. B.

M. B.

by R. B., their next friend.

— county, ss. A. B. and M. B., named in the above petition, being severally duly sworn, each for himself, says, he has heard read the foregoing petition, and knows the contents thereof; that the same are true of his own knowledge, except as to matters which are therein stated on information and belief, and as to such matters he believes it to be true.

Sworn to before me, this — }  
day of —, 18—.

A. B.  
M. B.

I hereby consent to be appointed the special guardian for the above named infant for the purposes mentioned in the above petition.

Dated —.

V. B.

In presence of —.

— county, ss. T. N. of —, and S. M. of —, being each severally and duly sworn, doth each for himself depose and say, that they are acquainted with the above named infants and their pecuniary circumstances, and the situation and value of their property; and that the material facts and circumstances alleged in the above petition are true; and that they and each of them are disinterested. That in their opinion a sale of the real estate of said infants would be for their benefit.

[Signatures.]

Sworn before me this — }  
day of —, 18—.

— county, ss. G. H., of —, being duly sworn, says, that on the — day of —, 18—, he saw R. B., named in the foregoing petition, sign her name thereto as next friend of the infants therein

named, the same having been first read over to her, and at the same time [or, on the — day of —,] saw V. B. sign the consent thereunder written [or, *thereon indorsed*] to be appointed special guardian for the said infants, for the purposes mentioned in said petition.

Sworn, etc.

G. H.

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No. 505.

*Order appointing special guardian and directing a reference.*

See Vol. II, p. 214, and note 17.

At a special term, etc.

In the matter of the petition of A. B. and M. B., infants, for leave to sell their real estate.
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On reading and filing the petition of A. B., an infant, over the age of fourteen years, who has no general guardian, and of M. B., an infant under fourteen years of age, who has no general guardian, by R. B., their mother and next friend, dated the — day of —, 18—, praying for the sale of certain premises therein described, under the direction of this court; and that V. B., of the city of —, be appointed special guardian for the purpose of conducting the sale and conveying the premises; which said petition is duly verified and supported, as to its material facts and circumstances, by the affidavits of two disinterested persons; and it appearing to the court, satisfactorily, that there is reasonable ground for the application; on motion of G. C., attorney for said petitioners, it is ordered, that the said V. B., on his executing his bond in the penal sum of — dollars, with two sufficient sureties, approved of as to its form and execution by a justice of this court or a county judge by his approbation indorsed thereon and filing the same with the clerk of — county, be and he is hereby appointed, on such condition, special guardian of the said infants for the purposes of this application. That said bond shall be conditioned for the faithful performance by the said V. B., of the trust reposed in him as such guardian, and for paying over, investing and accounting for, all moneys that shall be received by him, according to the order of any

APPENDIX OF PRECEDENTS.

court having authority to give directions in the premises ; and that he will observe the orders and directions of the court, in relation to such trust. And it is further ordered, that it be referred to W. O., Esq., of —, who is hereby appointed a referee for that purpose, to ascertain the truth of the allegations stated in said petition, and whether a sale of the premises, or any, and what part thereof would be beneficial to the infants, and the particular reasons therefor ; and to ascertain the value of the property proposed to be sold, and of each separate lot or parcel thereof, and the terms and condition upon which it should be sold ; and whether the infants, or either of them, are in absolute need of any, and what part of the proceeds of the sale, for their support and maintenance over and above the income thereof, and their other property, if any, together with what they might earn by their own exertions ; and if there is any person entitled to dower in the premises who is willing to join in the sale : also to ascertain the value of her life estate in the premises, on the principle of life annuities.

And it is further ordered, that no proceedings shall be had upon such reference, until the guardian produces a certificate of the said clerk, that the requisite security has been duly proved or acknowledged, and filed agreeable to the order of the court, and showing the name of the officer by whom the same was approved, and that said certificate be annexed to the report.

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No. 506.

*Bond of special guardian.*

See Vol. II., p. 214, and note 16.

Know all men by these presents, that we, V. B., of —, county of —, and O. N. and S. W., of the city of —, are held and firmly bound unto A. B., of —, an infant, under twenty-one years of age, in the penal sum of — dollars, to be paid to the said A. B., his heirs, executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves and our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the — day of —, in the year of our Lord one thousand eight hundred and —.



APPENDIX OF PRECEDENTS.

The condition of this obligation is such, that if the above bounden V. B. shall faithfully perform the trust reposed in him as the guardian of the above named infant, for the purpose of selling and disposing of certain real estate belonging to the said infant, and shall pay over, invest and account for all moneys and securities received by him as such guardian as aforesaid, according to the order of any court having authority to give directions in the premises, and shall observe and obey all orders and directions of any such court in relation to the said trust, then this obligation to be void, otherwise to remain in full force and virtue.

Sealed and delivered  
in presence of F. T.

V. B.  
O. N.  
S. W.

STATE OF NEW YORK, }  
*Saratoga County.* } ss.

On this — day of —, in the year one thousand eight hundred and —, before me, the subscriber, appeared V. B., O. N. and S. W., to me personally known to be the same persons described in and who executed the above bond, and severally acknowledged that they executed the same.

[Signature of officer.]

STATE OF NEW YORK, }  
— County. } ss.

O. N. and S. W., the sureties named in the above bond, being severally sworn, the said O. N. says he is a house [or free] holder of the county of —, in this state, and that he is worth in property not exempt from execution, the sum of \$—, over and above all debts and responsibilities which he owes or has incurred; and the said S. W. for himself says that he is a free [or house] holder of the county of —, in this state, and that he is worth in property not exempt from execution, the sum of \$—, over and above all debts and responsibilities which he owes or has incurred.

O. N.  
S. W.

Sworn before me, this — }  
day of —, 18—. }

I approve of the above [or, *within*] bond, as to its form and manner of execution, and of the sureties therein.

Dated —.

J. P., Justice of supreme court.

No. 507.

*Certificate of clerk, as to acknowledgment, filing and approval of bond.*

[*Title as in No. 505.*]

I hereby certify that the bond required by the order of this court made on the — day of —, 18—, to be given by V. B., the special guardian appointed by the court in this matter, has been duly acknowledged [or, *proved,*] and filed in my office, agreeably to the said order; and that said bond was approved, as to its form and manner of execution, by Hon. J. P., a justice of the supreme court.

Dated —.

J. W. H., Clerk of — county.

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No. 508.

*Referee's report.*

See Vol. II., p. 215, and note 18

[*Title as in No. 505.*].

In pursuance of an order of this court, made in the above matter, on the — day of —, 18—, by which it was referred to me, the subscriber, as referee, to ascertain the truth of the facts stated in the petition in this proceeding, and whether a sale of the premises stated in the said petition, or any and what part thereof, will be beneficial to the said infants, and the particular reasons therefor, and to ascertain the value of the property proposed to be sold, and of each separate lot or parcel thereof, and the terms and conditions upon which it should be sold, and whether the infants are in absolute need of any and what part of the proceeds of the sale for their support and maintenance over and above the income thereof, and their other property, together with what they might earn by their own exertions, and to ascertain if there is any person, entitled to dower in the premises proposed to be sold, who is willing to join in the sale, and also to ascertain the value of the life estate in the premises, on the principle of life annuities.

I do report that the said special guardian has produced before me the certificate required by said order, that the requisite security has

been duly acknowledged and approved and filed, and that I have proceeded to hear the proof produced before me, to examine into and ascertain the truth of the facts stated in said petition, and have examined into the matters alleged in said petition, and I do report that the same have been sufficiently proved, and that I am satisfied that all the material facts stated in the said petition are true, and that a sale of the real estate belonging to the said infants would be for the benefit of said infants, and that the reasons for my opinion are—[*state the reasons.*] (\*)

That I have taken testimony, and examined into the matters alleged in said petition, and from such examination and the testimony so taken, I am satisfied, etc., [*state all the facts required to be ascertained and reported;*] that the real estate described in said petition is worth — dollars; that it is unproductive, and yields an annual income to said infants of — dollars only; that in my opinion it will be for the interest of said infants to have the said real estate sold upon the following terms and conditions, viz.: that so much of the proceeds of their shares or interests in the said premises as may be necessary to pay their respective proportions of the gross value of the right of dower of their mother, R. B., therein, and the costs of these proceedings, be paid by the purchaser, on the delivery of the deed; and that the payment of the residue of the purchase money of the interests of said infants be secured by the bond of the purchaser and a mortgage upon the said premises, to be given to V. B., the special guardian as aforesaid [or, *to the treasurer of the county of —,*] in trust for the said infants, conditioned to pay the interest thereon, semi-annually, at the rate of seven per cent. per annum, and the principal in two equal instalments, one of which shall be paid when the said A. B. shall arrive at the age of twenty-one years, and the other when the said M. B. shall arrive at the age of twenty-one years.

That the said infants are not in absolute need of any part of the proceeds of such sale, for their support and maintenance, over and above the interest or income thereof and their other property, together with what they may earn by their own exertions.

That R. B., the mother of said infants, who is entitled to a right of dower in said premises, is willing to join in the said sale; that I have ascertained the value of her life estate in the premises, on the principle of life annuities, and that the present value thereof is — dollars.

All of which is respectfully submitted.

Dated —.

W. O., Referee.

## No. 509.

*Order for special guardian to contract for a sale.*

At a special term, etc.

[*Title as in No. 505.*]

On reading and filing the report of W. O., referee, appointed in the above matter by this court, bearing date the — day of —, 18—, from which it appears satisfactorily to this court that a sale of the estate, right and interest of said infants, in the premises referred to, and the sale of which is asked for in the petition in this proceeding is required by the interest of such infants, and for reasons and circumstances in such report stated, and that the interests of all concerned will be promoted thereby; on motion of G. C., attorney for said petitioners, it is *ordered* that the said report be and the same is hereby confirmed.

And it is further ordered that V. B., the special guardian for said infants, be and he is hereby authorized and empowered to contract for the sale and conveyance of all the right, title and interest of the said infants in and to such real estate, subject to the approbation of this court, but not for a sum less than the sum specified by said referee in his report, as the value thereof, and upon the terms and conditions in said report specified.

And it is further ordered, that before executing any deed or instrument of conveyance of the said premises to the purchaser thereof, the said guardian report to this court, upon oath, the terms and conditions of the agreement made by him for the sale of such premises, and the name of the purchaser.

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 No. 510.
*Report, by special guardian, of agreement to sell.*

See Vol. II., p. 216.

[*Title as in No. 505.*]

In pursuance of an order of this court, made in the above matter on the — day of —, 18—, I, the subscriber, the special guardian therein named, do report, upon oath, that I have entered into an agreement (subject to the approval of this court) for the sale of all the

right, title and interest of the above named infants, in and to the premises mentioned in such order and in the petition in this matter, with J. L., of —, upon the following terms and conditions; the said J. L. to pay therefor the sum of — dollars, as follows: So much of the said purchase money as may be necessary to pay the respective proportions of such infants of the gross value of the right of dower of their mother, R. B., therein, together with the costs of these proceedings, on the delivery of the deed; and the payment of the residue of said purchase money to be secured by the bond of the purchaser, and a mortgage upon the said premises, to be given by him to the treasurer of the county of — [or, to such person as the court may direct], in trust for the said infants, conditioned to pay the interest thereon, semi-annually, at the rate of seven per cent. per annum, and the principal in two equal instalments, one of which is to be paid on the day when the said A. B. shall arrive at the age of twenty-one years, and the other on the day when the said M. B. shall arrive at the age of twenty-one years.

I further report that the said R. B. has executed a release of all her right of dower in and to the undivided three-fourths part of said premises, owned by said infants; which release is hereto annexed; and that the gross value of such right of dower in the premises owned by said infants is — dollars; and the costs and expenses of these proceedings amount to — dollars. After deducting which sums from the amount of the purchase money aforesaid, there will remain the sum of — dollars due to the said infants collectively, to be secured as aforesaid, or — dollars to each.

And I do further report, that the terms and conditions on which I have made such agreement, subject to the approbation of this court, are the best terms upon which I could sell the said property, and that in my opinion the security above mentioned will be ample security for the payment of the balance of the purchase money not paid down and the interest thereon.

Dated the — day of —, 18—.

V. B., Special guardian.

Greene county, ss. V. B., the special guardian named in the above report, being duly sworn, says, that he has heard read the above report, and knows the contents thereof, and that the matters therein stated are true.

[Signature of officer.]

Sworn before me this — }  
 day of —, 18—. }

## No. 511.

*Order confirming report of special guardian, etc.*

See Vol. II., p. 216.

At a special term, etc.

[*Title as in No. 505.*]

On reading and filing the report of V. B., the special guardian of the infants above named, made in pursuance of an order of this court, dated the — day of —, 18—, stating that in pursuance of such order he had entered into an agreement, subject to the approval of this court, with J. L., of —, for the sale of all the right, title and interest of the said infants in and to the real estate mentioned in said order, upon certain terms and conditions in such report stated; and that R. B., the mother of said infants, had executed an effectual release of her right of dower in said premises: Now, on motion of G. C., attorney for said petitioners, it is ordered, that the said report and the agreement therein recited, be and the same are hereby ratified and confirmed.

And it is further ordered, that the said special guardian, in the name of and for the said infants execute, acknowledge and deliver to the said J. L., a good and sufficient deed and conveyance of all the estate, right, title and interest of the said infants, in and to the premises aforesaid, upon his complying with the terms and conditions upon which, by the said agreement, the deed was to be delivered. And it is further ordered, that out of the said purchase money the said special guardian pay to the attorney for the petitioners the sum of — dollars for costs of this proceeding, and that he pay to the said R. B., the sum of — dollars, for her right of dower in the shares of the said infants in the premises, and take her receipt therefor. (\*)

And it is *further ordered*, that of the remainder of such proceeds, so much as may be immediately necessary, be applied by such special guardian to the maintenance and education of the said infants, and that the residue thereof be kept and put out at interest or invested on bond and mortgage for the benefit of the said infants; and that the said special guardian do make a return to the court in writing and upon oath, of the investment and disposition of such residue of the proceeds, as soon as may be.

No. 512.

*The like—where proceeds are ordered to be brought into court.*

[As in No. 511 to (\*), then add:] And it is *further ordered*, that after the payment of the said sums, the said special guardian bring the residue thereof into court, and deposit the same with the treasurer of the county of —, to be invested in stocks, or put out at interest by him, for the benefit of said infants.

And it is *further ordered*, that the moneys which shall be received by the county treasurer, from time to time, for interest upon the bond and mortgage given by the purchaser, be paid over by him to the special guardian, to be applied by such special guardian to the maintenance and education of the said infants.

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No. 513.

*Deed of special guardian.*

See. Vol. II., p. 216, and note 20.

This indenture, made the — day of —, in the year one thousand eight hundred and —, between A., B. & M. B., infant children of T. B., late of —, deceased, by V. B., their special guardian, of the first part, and J. L., of —, of the second part, witnesseth:

Whereas, the above named infants, by R. B., their mother and next friend, heretofore presented to the supreme court a petition, praying for a sale of the right, title, and interest of the said infants in the premises in said petition mentioned and hereinafter described; upon which petition, an order of the said court was made, at a special term thereof, held at the court house in the village of —, in the county of —, bearing date the — day of —, 18—, appointing V. B., above named, the special guardian of such infants for the purposes of the said application, and directing that it be referred to W. O., a referee, to ascertain the truth of the facts in such petition alleged; and thereupon, after the said special guardian had given the security by law required, and the same had been duly approved and filed, such proceedings were afterwards had, that by an order of the said supreme

court, made at a special term thereof, held at Ballston, in the county of Saratoga, bearing date the — day of —, in the year 18—, it was among other things, in substance ordered, that the above named V. B., as special guardian of such infants, be authorized to contract for the sale and conveyance of the right, title, and interest of the said infants in such real estate, for a sum not less than that specified in the referee's report in said order mentioned; and that such sale, with the name of the purchaser and the terms thereof, be reported to the said court, before the conveyance of such premises should be executed.

And whereas, the said special guardian, upon the terms, and in the manner authorized by the said last mentioned order, contracted with the said J. L. for the sale of the said premises to him for the sum of — dollars, that being the highest sum offered for the same; and thereupon the said guardian made his report on oath, of such agreement, to this court, pursuant to the requisitions of the last recited order, upon which an order was made, at a special term of said court, held at the court house in —, in the county of —, bearing date the — day of —, 18—, confirming such report, approving and confirming such sale, and directing the same to be carried into effect, and ordering the said guardian, in the name of the said infants, to execute, acknowledge and deliver a deed of said premises to said party of the second part, on his complying with the terms on which, by said agreement, the same was to be delivered.

And whereas, the said party of the second part has complied with the said terms and conditions; now, therefore, this indenture witnesseth, that the said parties of the first part, by V. B., their said special guardian, by virtue of the several orders above mentioned, and in pursuance of the statute in such case made and provided, and for and in consideration of the sum of — dollars, to them in hand paid, before the ensembling and delivery of these presents, have bargained, sold, granted, released and conveyed, and by these presents do bargain, sell, grant, release and convey unto the said party of the second part, his heirs and assigns, forever, all the right, title, and interest of the said infants, parties of the first part, of, in and to the following described real estate and premises, viz.: the one undivided half-part of all that certain piece or parcel of land [insert description.] With the possession and claim of the parties of the first part of, in and to the same, and every part and parcel thereof, with the appurtenances, to have and to hold the same unto the said party of the second part, his heirs and assigns, to his and their only benefit and behoof forever.



APPENDIX OF PRECEDENTS.

In witness whereof, the said parties of the first part, by their guardian aforesaid, have hereunto set their hands and seals the day and year first above written.

Sealed and delivered in }  
 the presence of }  
 . C. C.

A. B. [L. s.]  
 M. B. [L. s.]  
 By V. B., their  
 special guardian.

STATE OF NEW YORK, }  
 \_\_\_\_\_ county. } ss.

I certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, before me appeared A. B. and M. B. to me personally known to be the persons described in and who executed the within deed, and severally acknowledged the execution thereof.

[Signature of officer.]

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No. 514.

*Release of widow's right of dower.*

Know all men by these presents, that I, R. B., of \_\_\_\_\_, widow of T. B., late of \_\_\_\_\_, deceased, for and in consideration of the sum of \_\_\_\_\_ dollars to me in hand paid by J. L., of \_\_\_\_\_, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, remised, released and quit-claimed, and by these presents do grant, bargain, sell, remise, release and quit-claim unto the said J. L., his heirs and assigns all that certain piece or parcel of land [*insert description.*] To have and to hold the said premises, with the appurtenances, to the said J. L., his heirs and assigns, to and for the use and behoof of him, and his heirs and assigns forever. And the said R. B., for herself, her heirs, executors and administrators, doth covenant and agree to and with the said J. L., his heirs and assigns, that she hath not done any act whereby the said above described premises now are, or at any time have been, incumbered or affected in any manner whatever.

In witness whereof, the said R. B. has hereunto set her hand and seal this \_\_\_\_\_ day of \_\_\_\_\_, 18—.

R. B. [L. s.]

Sealed and delivered }  
 in presence of }

(Add acknowledgment.)

No. 515.

*Final report of special guardian.*

See Vol. II., p. 217.

[Title as in No. 505.]

To the Supreme Court of the State of New York.

I, V. B., special guardian in the above matter having, by an order of this court made on the —— day of ——, 18—, been authorized and empowered to execute, acknowledge and deliver to the purchaser of the interest of said infants in the real estate mentioned and described in the petition in these proceedings, a conveyance, for a sum not less than \$—— do hereby certify and report, that I have executed such conveyance as in and by said order directed, such purchaser having complied with the terms and conditions of the agreement of sale. That I have received from such purchaser, on account of the purchase money, the sum of —— dollars. That out of said sum of —— dollars I have paid to the attorney of the petitioners the sum of —— dollars for the costs and expenses of these proceedings, including referee's fees, and —— dollars to R. B. to satisfy her dower interest in said premises; and that I have taken from the said R. B. a discharge in full of her said dower interest; and that I have disposed of the residue of said sum in the manner directed by this court, as follows, to wit: that I have taken from the attorney of the petitioners his receipt for such costs and expenses, which, together with the discharge of R. B. is hereto annexed.

I further report that I have taken from the said J. L. a bond and mortgage to the said infants [or, *state how funds have been disposed of.*] That I have invested the residue of the said proceeds, amounting to the sum of —— dollars, at an interest of seven per cent. per annum, payable semi-annually, on good security by bond and mortgage, to wit: the bond and mortgage of ——, of ——, and a mortgage executed and acknowledged by him and his wife, upon unincumbered real estate in the city of ——, worth double the amount of such proceeds, which mortgage I have caused to be recorded in the office of the clerk of the county of ——.

All of which is respectfully submitted.

Dated ——.

V. B., Special guardian.

—— county, ss. V. B., the special guardian above named, being duly sworn, says, he has heard read the foregoing report by him sub-

scribed, and knows the contents thereof, and that the facts therein stated are true.

Subscribed and sworn this — day } V. B.  
 of —, 18—, before me. }

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No. 516.

*Order confirming final report of special guardian.*

At a special term, etc.

[*Title as in No. 505.*]

On reading and filing final report of V. B., special guardian of A. B. and M. B., infants, of the execution and delivery of a deed of real estate of said infants, heretofore sold by him, bearing date —, 18—, and on motion of G. C., attorney for the said special guardian; *ordered* that the said report be, and the same hereby is, in all things ratified and confirmed.

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No. 517.

*Petition, by an infant over fourteen years of age, for appointment of a general guardian.*

See Vol. II., p. 219, and note 26.

To the Supreme Court of the State of New York.

The petition of A. B., of the town of —, in the county of [Greene,] respectfully shows: that your petitioner is the son of T. B., late of —, deceased, and is of the age of about fifteen years. That, as one of the devisees of his said father, now deceased, your petitioner is seised of, and entitled to, an estate in fee, in and to a certain house and lot, situate in the village of —, the gross income of which is about — dollars, annually; also of a certain farm or tract of land situate in the town of —, in the county of —, consisting of about — acres, the annual income of which is about — dollars. That he is also the owner of the following personal estate, viz.: [*describing it.*]

APPENDIX OF PRECEDENTS.

And your petitioner further shows that he has not, to his knowledge or belief, any other property, real or personal, nor any right or interest in other property than that above described. That on account of his inability to protect his rights and interests, he is desirous of having some suitable and proper person appointed by this court to take charge thereof.

Your petitioner therefore prays that R. B., of —, who is the uncle of your petitioner, may be appointed the general guardian of his person and estate, upon his giving security for the faithful performance of his trust, as such guardian, according to the statute, and in conformity with the rules and practice of this court.

Dated —.

A. B.

(Add verification as in No. 489.)

I hereby consent to be appointed the general guardian of the above petitioner; and I offer as my sureties, J. K. and L. M., both of —, in the county of —.

R. B.

Dated —.

— county, ss. G. C., of —, being duly sworn, says, that on the — day of —, 18—, he saw A. B., the infant named in the above petition, sign his name thereto, the same having been first read over to him; and at the same time [or, *on the — day of —,*] saw R. B. sign the consent thereunder written [or, *indorsed thereon*] to become the general guardian of the said infant.

Sworn, etc.

G. C.

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No. 518.

*Affidavit to be annexed to foregoing petition.*

In the matter of A. B., an infant.
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— county, ss. J. T. of said town of —, being duly sworn, says, that he is well acquainted with the said infant, and with the amount and value of his real and personal property; and that he has no interest therein [adverse to said infant.]

And deponent further says, that the amount, nature and value of

the real and personal property of the said infant is correctly stated in the said petition; that the gross amount or value of the rents and profits of the said real estate is about — dollars annually, and that the aggregate amount of such rents and profits, during the infant's minority, will be about the sum of — dollars.

Sworn etc.,

J. T.

No. 519.

*Petition on behalf of infant under the age of fourteen.*

To the Supreme Court of the State of New York.

The petition of S. B., the mother of A. B., an infant under the age of fourteen years, respectfully shows, that your petitioner is the widow of T. B., late of —, deceased; that as one of the devisees of his said father, now deceased, the said infant is seized of and entitled to, an estate in fee in and to a certain house and lot situate in the town of —, the gross income of which is about — dollars annually, also of the following personal estate, viz.: [*describing it.*]

And your petitioner further shows, that said infant has not, to her knowledge or belief, any other property, real or personal, nor any right or interest in other property than that above specified; that on account of said infant's tender age and of your petitioner's inability to protect his rights and interests, she is desirous of having some suitable and proper person appointed by this court to take charge thereof.

Your petitioner therefore prays that R. B., of —, who is the uncle of such infant, [*Conclude as in No. 517.*]

No. 520.

*Order of reference under No. 517 or 519.*

At a special term, etc.

In the matter of the petition of A. B., an in- fant, for the appointment of a general guardian.	}
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On reading petition above mentioned, and on motion of —, of counsel for the petitioner, it is *ordered* that said petition be referred to

W. O., of —, as referee, who shall, by inspection or otherwise, ascertain the age of the said infant, A. B., and if he be of the age of fourteen or upwards, the said referee shall examine him as to his voluntary nomination of a suitable and proper person as guardian. And if the said infant be under the age of fourteen years, the referee shall ascertain who is entitled to the guardianship, and shall name a competent and proper person as guardian. The referee shall, also, ascertain the amount of the personal property, and the gross amount or value of the rents and profits of the real estate of the infant, during his minority; and also ascertain the sufficiency of the security offered by the guardian. And the referee may, in his discretion, direct notice to be given to such of the relatives of the infant as he may think proper, to appear before him and be heard in relation to the application. And the said referee is hereby directed to pass upon the security to be given by the guardian, in compliance with the 65th rule of this court; and in doing so, he shall also state that each of the persons proposed as sureties for such guardian, and for the performance of his duties, is worth the requisite amount, over and above all his debts, or that the real estate proposed to be given as security is of the value required by such 65th rule, and that the same is unincumbered.

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No. 521.

*Referee's report thereon.*

[*Caption.*]

[*Title as in No. 520.*]

To the Supreme Court of the State of New York.

In pursuance of an order of this court, in the above matter, dated the — day of —, 18—, whereby it was referred to me, the undersigned, as referee, to ascertain and report the age of the said infant, and as to his voluntary nomination of a guardian; who is entitled to the guardianship; and to name a competent and proper person as guardian; to ascertain the amount of the personal property, and the gross amount of the rents and profits of the real estate of the infant during his minority; and also to ascertain the sufficiency of the security offered by the guardian, etc.; I, the undersigned referee, as aforesaid, do certify and report, that the petition of the above named infant, in this matter, having been presented to me, and having been

attended by the said infant, and by his attorney, I have proceeded to make such inquiries and examination as the said order required—having previously directed notice to be given to the mother of said infant, with whom he resides, and to —, to appear before me, if they desire to be heard in relation to the said application, and having required the attendance of such witnesses as appeared to me to be necessary, to give testimony on the subject of such application.

And I further report that from an inspection of the said infant, as well as from the affidavit of S. B., his mother, taken before me, I am satisfied the age of said infant is about [fifteen] years; that I have examined him as to his nomination of a guardian, and find that he voluntarily nominated his uncle, the said R. B., to be his general guardian; and that I am of opinion the said R. B. is a suitable and proper person to be appointed such guardian.

I further report that the amount, nature and value of the real and personal property of the said infant is correctly stated in the said petition; that the gross amount or value of the rents and profits of said realty is about ——— dollars; and that the aggregate amount of such rents and profits, during his minority, will be the sum of ——— dollars.

I further report that such guardian has offered A. P. and C. K., both of ———, as his sureties; and having taken from each of them an affidavit as to his sufficiency, and made inquiries relative thereto, I am satisfied that the sureties so offered are sufficient. And I certify that each of such sureties is worth the sum of ——— dollars, over and above all his debts.

And I further report that the said proposed guardian should be required to give security in the sum of ——— dollars.

All of which is respectfully submitted.

Dated ———.

W. O., Referee.

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No. 522.

*Order appointing general guardian.*

At a special term, etc. [*as in No. 35.*]

[*Title as in No. 520.*]

On reading and filing the petition of A. B., an infant over the age of fourteen years, praying for the appointment of R. B. as the general

APPENDIX OF PRECEDENTS.

guardian of his person and estate, upon his giving the requisite security, together with the consent of the said R. B. to be appointed such guardian, and the proposal by him of A. P. and C. K., of ———, as his sureties; and on reading and filing the affidavit of ———, and on motion of G. C., of counsel for said infant; *ordered* (\*) that the said R. B. be and he hereby is appointed general guardian of the person and estate of the said A. B., upon his executing a bond to the said infant with the said A. P. and C. K. as his sureties, in the penal sum of ——— dollars, conditioned that the said R. B. shall faithfully perform his trust as such guardian, and file an inventory of the estate of said infant within six months after his appointment, and render the annual inventory or account of his guardianship required to be rendered and filed by the practice of this court; that he shall observe and obey all the general rules of this court respecting general guardians, and such orders as shall be made by this court, from time to time, in relation to such trust; and that he shall render a just and true account of all moneys and property of said infant, which shall come to his hands as such general guardian, and of the application thereof, and of his guardianship generally before any court having jurisdiction, whenever he shall be thereunto lawfully required.

And it is *further ordered* that the execution of such bond be acknowledged or proved, as required by statute, and approved, as to its form and manner of execution, by one of the justices of this court, to be signified by his approval indorsed thereon, and filed in the office of the clerk of this court.

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No. 523.

*The like—on report of referee, where infant is under fourteen years of age.*

At a special term, etc.

[*Title as in No. 520.*]

On reading and filing report of ———, referee, bearing date the ——— day of ———, 18—, made on the petition of S. B., the mother of A. B., an infant under the age of fourteen years, praying for the appointment of R. B. as the general guardian of the person and estate of said infant; and it appearing by said report that the said R. B. is a suitable and proper person to be appointed such guardian, and that A. P. and



APPENDIX OF PRECEDENTS.

C. K., of —, whom the said R. B. proposes as his sureties, are freeholders [or, *householders*] of said county of —, and are each worth the sum of — dollars [*double the amount of security required*], over and above all debts and responsibilities; now, therefore, on motion of G. C., of counsel for said infant, ordered [*as in No. 522 from the (\*) to the end.*]

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No. 524.

*Bond of general guardian.*

Know all men by these presents that we, R. B., A. P. and C. K., all of the town of —, are held and firmly bound unto A. B., an infant son of the late T. B., of —, deceased, in the sum of — dollars, to be paid to the said A. B., his heirs, executors, administrators or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators or assigns, jointly and severally, firmly by these presents. Sealed with our seals, and dated the — day of —, in the year 18—.

Whereas, by an order of the supreme court of the state of New York, made on the — day of —, 18—, the above bounden R. B. was appointed the general guardian of the person and estate of the above named A. B., an infant under the age of twenty-one years, upon his executing a bond to the said A. B. with the said A. P. and C. K. as his sureties, in the penalty and upon the condition therein mentioned; now, therefore, the condition of this obligation is such that if the above bounden R. B. shall faithfully perform his trust as such guardian, and shall file an inventory of the estate of said infant within six months after his appointment, and render the annual inventory and account of his guardianship, required to be rendered and filed by the practice of the said supreme court, and shall observe and obey all the general rules of said court respecting general guardians, and such orders as shall be made from time to time, by the said court, in relation to such trust; and if he shall render a just and true account of all moneys and property of said infant which shall come to his hands as such general guardian, and of the application thereof, and of his guardianship generally, before any court having jurisdiction, when-

APPENDIX OF PRECEDENTS.

ever he shall be thereunto lawfully required, then this obligation to be void ; otherwise to be and remain in full force and virtue.

Sealed and delivered } in presence of }	R. B. A. P. C. K.
--	-------------------------

[Add the usual acknowledgment.]

— county, ss. A. P. and C. K., of the town of —, in said county, the sureties named in the above bond, being severally sworn, each for himself deposes and says, that he is a resident and householder [or *freeholder*] of said county of —, and is worth the sum of — dollars, over and above all debts and responsibilities which he owes or has incurred, and exclusive of property exempt from execution.

Sworn, etc.	A. P. C. K.
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I approve of the within bond, as to its form, and manner of execution.  
Dated —. J. P., Justice of supreme court.

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No. 525.

*Inventory to be filed by general guardian.*

See Vol. II., p. 221.

In the matter of the guardianship of A. B., an infant.
--

A just and true inventory of the whole real and personal estate of the above named infant A. B., committed to the care of R. B., his guardian, showing the manner in which the funds are invested, the income and profits thereof, etc., etc.

An undivided one-third part of a farm of land situate in the town of —, county of —, containing 125 acres, of the estimated value of \$80 per acre; being for the share of said infant.....	\$333 33
Said farm is leased to —, from year to year, for \$510 per annum; making yearly income of said infant therefrom....	170 00
A bond and mortgage of —, well secured on real estate, for \$2000, the annual income of which, at 7 per cent. interest, is	140 00

[Continue stating each item of property, how invested and income therefrom, debts and credits, etc.]

APPENDIX OF PRECEDENTS.

— county, ss. R. B., the general guardian of the above named infant A. B., being duly sworn, says, that the above is a just and true inventory of the whole real and personal estate and effects of the said infant, so far as the same have come to his knowledge.

Sworn, etc.

R. B.

No. 526.

*Annual account of general guardian.*

See Vol. II., p. 221.

The estate of A. B., an infant, in account with R. B., his general guardian.

	Dr.
187—	
July 1. To cash paid F. G. for board and lodging of said infant, from January 1, 187—, to this date.....	\$
“ Paid J. K. his bill, for clothing for said infant.....	\$
	\$

Contra.

	Cr.
187—	
Jan. 1. By balance due said infant as per last account.....	\$
July 1. Semi-annual interest on bond and mortgage of ———.	\$
<i>[Proceed in same manner as to other items.]</i>	

Dated ———.

— county, ss. R. B., the general guardian of the above named infant A. B., being duly sworn, says, that the above is a just and true account of all the receipts and disbursements of this deponent, on account of the real and personal estate of the said A. B., [in subsequent accounts, add:] since this deponent rendered his last annual account, on the ——— day of ——— last, and the above balance struck is the whole amount due the said infant as his general guardian, at this date.

Sworn etc.

R. B.

## No. 527.

*Petition of general guardian of an infant, for partition or sale of real estate.*

See Vol. II., p. 221, and note 30.

To the Supreme Court of the State of New York. .

The petition of R. B., of —, the general guardian of A. B., an infant, respectfully shows: that your petitioner was duly appointed the general guardian of said infant, by an order of this court, bearing date the — day of —, 18—, on his executing and filing the security mentioned in said order; that such security has been duly executed and filed, as required by said order, and your petitioner thereupon entered upon the duties of his trust as such guardian. (\*)

Your petitioner further shows, that said infant is of the age of — years, and resides at —, with your petitioner, [or, *with his mother,*] and is not the owner of any real estate other than that mentioned herein, which is sought to be partitioned or sold.

That said infant is one of the children and heirs-at-law of T. B., late of —, deceased, who died intestate on the — day of —, seised of certain real estate in the county of —, to wit, [*insert description.*]

That said infant, as such heir-at-law, is now a tenant in common, in fee simple, of said premises, with the other children of said T. B., deceased, to wit, H. B. and L. B., subject to the dower right of S. B., their mother.

That the value of said real estate is about — dollars, and said infant has personal property only to the amount of — dollars, which is in the hands of your petitioner as his general guardian, and invested for him, the said infant, the income whereof is insufficient for his support and maintenance.

That said property consists of building lots, and is wholly unproductive, [or, *state any other facts showing necessity of a partition or sale.*]

That for these reasons, the interests of said infant, as your petitioner believes, require a sale of said premises, the said infant being in need of the income of his proportional share, for his maintenance and education.

That the other tenants in common, above named, to wit, H. B. and L. B., are of full age (\*) and are desirous of agreeing to a partition of said premises; [or, if a partition thereof cannot be made, are desirous of uniting with your petitioner in a sale thereof;] and that one of said

tenants in common, to wit, the said H. B., insists upon such partition [or sale,] and is about to commence an action therefor, unless your petitioner shall be authorized to agree to a partition [or sale] of said premises; and that such action will necessarily be attended with far greater expense, and will otherwise be less advantageous to the interests of said infant, [or, *state any other special reason for a partition, and whether the premises can be actually divided.*]

Wherefore, your petitioner prays that he may be authorized and directed, pursuant to the statute in such cases made and provided, as the general guardian for, and on behalf of, said infant, to agree to a division and partition of said premises [or, in case an actual division cannot be made, then to unite with the other tenants in common in a sale of said premises, or such part thereof as, in the opinion of the court, are incapable of partition;] or for such other or further relief as the court shall think proper to grant.

And your petitioner, etc.

R. B., General guardian of  
A. B., an infant.

[Add verification as in No. 489.]

— county, ss. H. B., of —, being duly sworn, deposes and says: That he has read [or, *heard read*] the foregoing petition, and that the same is true, to the best of deponent's knowledge, information and belief; that deponent is one of the tenants in common, and joint owners of the premises described in said petition; that he is of full age, and desires a partition or sale thereof, if said premises are incapable of division; that he, and the other co-tenant, L. B., who is of full age, are willing to agree with the said guardian to a division, or to unite with him in a sale, if they cannot be divided. That in the opinion of this deponent the said premises are so situated that they are capable of being fairly partitioned between the parties: [or, that the said premises are so circumstanced that a partition thereof cannot be made without great prejudice to the owners, due regard being had to the power of the court to adjudge compensation to be made for equality of partition, and to the ability of the respective parties to pay a reasonable compensation to produce such equality.]

Sworn, etc.

H. B.

No. 528.

*Order of reference on No. 527—where sale is necessary.*

At a special term etc.

<p>In the matter of the application of R. B., general guardian of A. B., an infant, for leave to agree to a partition or sale of real estate of infant.</p>
---

In reading and filing petition of said guardian, duly verified, and affidavit of H. B., thereto annexed, and on motion of —, of counsel for petitioner, it is *ordered* that it be referred to W. O., of —, to inquire into and ascertain the truth of the facts set forth in said petition, and report thereon to this court, with all convenient speed. That said referee also inquire and report whether the said premises, or any lot or separate parcel thereof, are so circumstanced that an actual partition thereof cannot be made without great prejudice to the owners thereof. That if said referee arrives at the conclusion that a sale of the whole, or any part of the premises is necessary, he specify the same in his report, together with the reasons which render a sale necessary. That he also, in such case, ascertain whether a sale of the premises described in said petition, or any and what part thereof, would be beneficial to said infant, and the particular reasons therefor; and to ascertain the value of said premises, and of each separate lot or parcel thereof, and the terms and conditions upon which it should be sold; and whether the said infant is in absolute need of any, and what part of the proceeds of the sale, for his support and maintenance, over and above the income thereof, and his other property, together with what he might earn by his own exertions; and to ascertain the value of the life estate of S. B., the mother of said infant, in the premises, on the principle of life annuities, by reason of her right of dower in said premises.

No. 529.

*Report of referee, as to necessity of a sale, etc.*

[*Title as in No. 528.*]

Pursuant to an order of reference in this matter, bearing date on the — day of —, whereby it was referred to me, as referee, to inquire into and ascertain the truth of the facts set forth in the petition in this matter, and to inquire and report as to the other matters stated in said order, I, the said referee, do respectfully report :

That having been attended by the said petitioner and his attorney, and taken testimony upon the matters set forth in said petition, and required by said order to be inquired into, I am satisfied (\*) that the premises mentioned in said petition [or, *a certain part thereof*, specifying what part,] are so circumstanced that an actual partition cannot be made without great prejudice to the owners thereof.

And I further report that in my opinion a sale of the whole of said premises would be for the benefit of the owners thereof, and that the reasons for my opinion are as follows: [*state the particular reasons.*] That [*continue as in No. 508, from the (\*) to the end, with the necessary variations.*]

No. 530.

*Order directing guardian to agree to a partition.*

At a special term, etc.

[*Title as in No. 528.*]

On reading and filing petition of R. B., general guardian of A. B., an infant, duly verified, with the affidavit of H. B. annexed thereto [or, if there has been a reference, say: *on the report of —, the referee herein, bearing date —, from which it appears, etc., etc.*,] and it appearing to the court that a partition of the premises described in the petition can be made, and that sufficient grounds for this application exist; now, therefore, on motion of —, of counsel for the petitioner, it is *ordered* that the said R. B., general guardian of said infant, A. B., be, and he hereby is, pursuant to the statute in such case made and provided, authorized, empowered and directed as such guardian, and for and in behalf of said infant (†) to agree with the

other tenants in common and joint owners of said premises, [all of whom, as appears, are of full age,] for an actual partition and division of said premises. And that said guardian for and in behalf of said infant, with the other tenants in common, or by and under their direction, and with their consent, do make such division and partition according to the respective rights, titles, estates and interests of the parties, as the same are set forth in said petition [or, *in the report of the said referee* ;] that is to say, that they divide the said premises into — equal parts, etc., [*setting forth mode of partition, provision for dower interest, if any, etc.*]

And it is further *ordered* that said agreement and partition be made subject to the approval of the court; and that said guardian, before executing any release or other conveyance of said infant's interest in said premises, report to the court, on oath, the partition and division so agreed upon by him, with a particular description by metes and bounds, of the portion of said premises allotted to each party in interest, respectively.

The premises herein ordered to be partitioned are described as follows: [*insert description.*]

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No. 531.

*Order directing guardian to agree to a sale, etc.*

At a special term, etc.

[*Title as in No. 528.*]

On reading and filing report of —, the referee herein, bearing date the — day of —, 18—, it appearing that a partition of the premises described in the petition herein cannot be made, and that sufficient grounds exist for directing a sale of said premises; now, therefore, on motion of —, of counsel for the said petitioner, it is *ordered* that the said R. B., general guardian of said infant, A. B., be, and he hereby is, pursuant to the statute in such case made and provided, authorized, empowered and directed, as such guardian, and for and in behalf of said infant, to unite with the other tenants in common and joint owners of said premises, (all of whom, as it appears, are of full age) in a sale of the premises mentioned in said petition, upon executing and filing with the clerk of the county of



—, his bond in the penal sum of — dollars, with two sufficient sureties, freeholders or householders of said county, each of whom shall justify in double the amount of such penalty, conditioned for the faithful performance by the said R. B., of the trust reposed in him as such guardian, and for paying over, investing and accounting for, all moneys that shall be received by him under and by virtue of this order; for, or on account of, or belonging to said infant, according to the order of any court having authority to give directions in the premises, and that he will observe the orders and directions of the court in relation to such trust.

And it is *further ordered*, that upon the approval and filing of such security the said guardian be, and he hereby is, authorized, with said other tenants in common, to execute, subject to the further sanction and approval of the court, a written contract for the sale and conveyance of all the right, title and interest of the said infant, in and to such real estate, at a price not less than the sum specified by said referee in his report as the value thereof, and upon the terms and conditions therein specified. And that before executing any deed or instrument of conveyance of the said premises to the purchaser or purchasers thereof, the said guardian report to the court, on oath, the terms and conditions of the agreement made by him, for the sale of said premises.

CHAPTER VI.

PROCEEDINGS RESPECTING IDIOTS, LUNATICS, HABITUAL  
DRUNKARDS, ETC.

No. 532.

*Complaint in an action by committee.*

See Vol. II., p. 224, and note 1.

SUPREME COURT.

A. B., as committee of  
H. E., an idiot [or, a *lunatic*, or, an *habitual drunkard*,]  
plaintiff.

*against.*

C. D. and E. F., defendants.

The plaintiff, complaining as the committee of H. E., an idiot [or, a *person of unsound mind*, or, an *habitual drunkard*] alleges, that on the — day of —, 18—, upon proceedings duly instituted in the supreme court of this state, in and for the county of —, [or, *in the case of an habitual drunkard, it may be—*duly instituted in the county court of the county of —,] by an inquisition taken and returned, said H. E. was found to be an idiot [or, a *lunatic*, or, an *habitual drunkard*,] and thereupon this plaintiff was, by an order duly made by said court, on the — day of —, 18—, at —, appointed committee of the person and estate of the said H. E.

That at the time of the appointment of this plaintiff as such committee, the defendant was, as this plaintiff is informed and believes, indebted to the said H. E., in the sum of — dollars for [*allege nature and form of indebtedness.*]

This plaintiff further says, that he is informed and believes that the said indebtedness upon the — aforesaid, has not been paid, nor any

part thereof, either to the said H. E., before the appointment of this plaintiff as committee, or to this plaintiff since said appointment, and he alleges and claims that by virtue of said order of the supreme court, said sum of money became due and payable to this plaintiff, and is still due to him, he being the owner thereof, as aforesaid.

Wherefore the plaintiff demands judgment, etc. [*state the relief asked for.*]

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No. 533.

*Petition of a creditor for payment of his debt, by committee, or for leave to sue idiot, lunatic, etc.*

See Vol. II., p. 225, note 2.

To the Supreme Court of the State of New York.

The petition of A. B., of —, shows, that on the — day of —, 18—, upon proceedings duly instituted in this court, [or, *in the county court of — county,*] and by an inquisition then taken and returned, H. E., of —, was found and adjudged to be an idiot [or, *a lunatic; or, a person of unsound mind; or, to be incapable of conducting his own affairs, in consequence of habitual drunkenness;*] and thereupon E. F., of —, was, by an order of said court, duly made on the — day of —, 18—, at —, appointed the committee of said H. E. That on the — day of —, 18—, and as your petitioner is informed and believes, before said H. E. became an idiot [or, *a lunatic, etc.*] he became indebted to your petitioner in the sum of — dollars, for [*state nature and form of indebtedness.*] And that the said H. E., is now justly indebted to your petitioner thereon, in the sum of — dollars, [with interest from —.]

That the petitioner has presented his demand to said E. F., the committee of said H. E., for payment out of the estate of said E. F., but that said committee refuses to pay the same.

That said petitioner has fully and fairly stated the case in this matter to J. C., his counsel, who resides at —, in the county of —; and that he has a good, substantial and meritorious cause of action thereon, as he is advised by his said counsel, after such statement made as aforesaid, and verily believes to be true.

Wherefore, your petitioner asks that the said committee may be

ordered to pay the amount so due out of the property, estate and assets of the said H. E. in his hands as such committee, with the costs of this application; or that the petitioner have leave to bring an action against the said H. E., to recover the same; and for such other and further relief as may be just. [Or, *where the idiot, etc., is made a party, incidentally to relief sought, chiefly against others, say*: wherefore your petitioner asks that he may have leave to join the said E. F. as a defendant in the action to be brought by said petitioner thereon; and for such other, etc.]

Dated —.

A. B.

[Verification.]

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No. 534.

*Order for payment of debt, or for leave to sue idiot, lunatic, etc.*

At a special term, etc.

In the matter of the petition of A. B.	}
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On reading and filing the petition of A. B., dated on the — day of —, 18—, asking for an order that E. F., the committee of the person and estate of H. E., be ordered to pay the demand therein set forth, or that the petitioner have leave to bring an action against H. E. to recover the same, [or, *that the petitioner have leave to join the said H. E. as a defendant, in an action to be brought by him, as therein set forth* ;] and on reading and filing proof of the service of said petition upon such committee, and after hearing —, of counsel for the petitioner, and —, of counsel for the committee; it is *ordered* that the said committee of the estate of H. E. pay to the said petitioner or his attorney, out of the property, estate and assets of the said H. E. in his hands as such committee within — days from the service of a copy of this order upon him, the amount of the said petitioner's claims, mentioned in said petition, and which are here adjudged at the sum of — dollars, and interest thereon from the — day of —, 18—, together with ten dollars, costs of this application; or that in default of such payment, the petitioner, A. B., have leave to bring an action

in [this] court, against the said H. E., upon the grounds of action mentioned in the said petition, [or, *leave to join H. E. as defendant in the action to be brought by him on the grounds mentioned in the petition.*]

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No. 535.

*Complaint in an action against committee.*

A. B. <i>against</i> E. F. as committee of the person and estate of H. E., an idiot, [or, a lunatic, etc.]
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[*Usual commencement, and statement of cause of action against idiot or lunatic, etc.; (a) after which, add:.*] that afterwards [or, on the — day of —, 18—, at —,] the said H. E. was duly declared and adjudged to be an idiot, [or, *lunatic, etc.*] That the defendant was then and there by the said court duly appointed committee of the [person and] estate of the said H. E.

Wherefore, the plaintiff demands judgment for — dollars, with interest from the — day of —, 18—, to be paid out of the estate of the said H. E., in the hands of the defendant as such committee.

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No. 536.

*Petition for a commission against a lunatic.*

See Vol. II., pp. 227, 228.

In the matter of H. E., an alleged lunatic.
---

To the Supreme Court of the State of New York.

The petition of F. E., of —, in the county of —, shows: that H. E., residing at —, who is the [father] of your petitioner, (\*) now

(a) A complaint against a committee of an habitual drunkard, which omits to allege or show by what court or authority the debtor was declared an habitual drunkard, and the custody of his person and estate awarded to the defendant, is bad, on demurrer, for not stating a cause of action. (*Hall v. Taylor*, 8 How. Pr. 428.)

is, and for the space of — years last past has been a lunatic, and utterly deprived of his reason, rendering him unfit to manage his own affairs, as appears by the affidavits hereto annexed.

Your petitioner further shows, that said H. E. is the owner of the following property, to wit, a house and lot, situate in the — of —, and some personal property, consisting of [*describing it*], and worth, in the aggregate, about the sum of — dollars.

That your petitioner and G. E., whose affidavit is hereto annexed, constitute all the persons who would be, in case of his death, the next of kin and heirs-at-law of said H. E.

Your petitioner therefore prays that a commission, in the nature of a writ *de lunatico inquirendo*, may issue out of, and under the seal of this court, to inquire of the lunacy of the said H. E., and to be directed to such persons as to the court may seem proper.

Dated —.

F. E.

[Verification as in No. 489.]

No. 537.

*The like—in case of mental unsoundness.*

[*As in No. 536 to the \* , then :*] being of the age of — years and upwards, is, on account of such extreme age, so far debilitated in mind and deprived of his reason as to be wholly unable either to govern himself or to manage his own affairs; as appears by the affidavits hereto annexed.

That he, the said H. E., is the owner of the following property, to wit: [*describe it, and conclude as in No. 536; excepting that the prayer should be for a commission to inquire as to the “mental unsoundness” of H. E.*]

No. 538.

*Petition for a commission against an habitual drunkard.*

In the matter of H. E., an alleged <i>habitual drunkard</i> .
--

To the Supreme Court of the State of New York.

The petition of S. E., of —, wife of H. E., of said town and county, respectfully shows: That said H. E. is, and for — years last past has been, an habitual drunkard; that the said H. E. is of the age of about — years; that he has a family, consisting of a wife and — small children, dependent upon him and his property for their support; that the said H. E. is the owner of a farm [or, *house and lot*] situated in —, worth about — dollars, and also of personal property to the amount of — dollars.

Your petitioner further shows, that the said H. E., about — years ago, first became immoderately addicted to the use of strong drinks; which habit, from that time, has increased upon him until he became, and now is, an habitual drunkard, wholly incapable of managing his business; and he is, and for several months past has been, for a considerable portion of the time, and almost daily, in a state of intoxication.

Your petitioner therefore prays that a commission may issue out of and under the seal of this court, to inquire of the habitual drunkenness of the said H. E., to be directed to such persons as to the court may seem proper.

Dated —.

S. E.

[Add verification as in No. 489.]

No. 539.

*Affidavit of physician, to accompany No. 536.*

[*Title as in No. 536.*]

— county, ss. J. B., being duly sworn, says: That he is a practising physician and surgeon, residing at —, in said county; that

APPENDIX OF PRECEDENTS.

he is acquainted with H. E., having attended him professionally, within the last — years, several times; and that he has been well acquainted with him, professionally and otherwise, for several years, and has, for a part of that time, attended him as his family physician. And deponent further says that the said H. E. is, in deponent's opinion and belief, a lunatic [or, *idiot*], of unsound mind, and totally unfit for the government of himself or the management of his property; and that he has been in that condition for [one] year or more, last past. That the grounds of deponent's opinion and belief are as follows: [*state the facts, etc.*]

Sworn, etc.

J. B.

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No. 540.

*Affidavit to accompany No. 538.*

[*Title as in No. 538.*]

— county, ss. E. M., of —, in said county, being duly sworn, says: That he is well acquainted with the said H. E., and has been acquainted with him for — years, or more, last past; that the said H. E. has, for a period of — years, or more, been addicted to the immoderate use of spirituous liquors, and for more than a year, last past, has been an habitual drunkard, and, in the opinion and belief of this deponent, unfit to govern himself, or to manage his own affairs. That the grounds of deponent's opinion and belief are, that deponent has had frequent opportunity of seeing and meeting said H. E. during the last — years, and, on average, as often as three or four times a week; and that upon nearly every occasion when deponent has so met said H. E., he has found him in a state of intoxication, often to such a degree as to be unable to help himself. That said H. E. has, during the last two years, greatly neglected his business, and has become idle and improvident, and greatly in debt, and liable to squander and lose his property, etc. etc.

Sworn, etc.

E. M.



No. 541.

*Order for a commission to inquire as to idiocy, or lunacy or habitual drunkenness.*

At a special term, etc.

<p>In the matter of H. E., and alleged habitual drunkard.</p>
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On reading and filing the petition of S. E., of —, dated the — day of —, 18—, and the affidavit of E. M., of said county, annexed to the said petition, and on motion of —, of counsel for the petitioner; it is *ordered* that a commission in the nature of a writ *de lunatico inquirendo* be issued out of, and under the seal of this court, in the usual form, directed to H. M., counsellor at law, T. R., physician, and W. F., merchant, all of the county of —, to inquire, by a jury of the said county, and of the neighborhood in which the said H. E. resides, of the lunacy [or, *idiocy*; or, *habitual drunkenness*; or, *mental unsoundness*] of the said H. E.; and that the sheriff of said county be instructed, in said commission, to summon such jury.

And it is *further ordered* that the said commission be executed at, or at some convenient place near to, the residence of the said H. E.; and that previous notice of the time and place of such execution be given to the said H. E., and to the person or persons having the care of him.

And it is *further ordered* that upon the execution of said commission, the person or persons having the care or custody of the said H. E., do produce him before the said commissioners and jury, to be inspected and examined by them, whenever required to do so, by such commissioners.

No. 542.

*Commission under No. 541.*

See Vol. II., p. 229.

[L. s.] The People of the State of New York, to H. M., T. R., and W. F., of the county of —, greeting.

Know ye, that we have assigned to you, or any two of you, to inquire, by the oaths of good and lawful men of the county of —, by whom the truth of the matter may be the better known, whether H. E., of —, in said county, is a lunatic [or, *an idiot*, or, *habitual drunkard*,] so that he is not sufficient for the government of himself, or the management of his lands and tenements, goods and chattels [or, *is incapable of conducting his own affairs in consequence of habitual drunkenness*,] and if so, from what time, after what manner, and how. And if the said H. E., being in that condition, has alienated any lands and tenements or not, and if so, what lands and tenements, to what person or persons, when, where, after what manner, and how; and what lands and tenements, goods and chattels, as yet remain to him; and of what value the lands and tenements by him alienated, as well as those by him retained, and how much the rents, issues and profits thereof are worth by the year; and what is the value of his goods, chattels and personal estate; and who will be the nearest heirs of the said H. E., and entitled to his estate, in case of his death; and of what age.

And therefore we command you, or any two of you, that at a certain day and place, or at certain days and places, which you for that purpose shall appoint, you diligently make inquisition in the premises, and that you cause reasonable notice of the time and place by you appointed for that purpose, to be given to the said H. E.; and that you send the inquisition which you shall thereupon make, under your seals or the seals of any two of you, and the seals of those persons by whom it shall be made, distinctly and plainly, and without delay, to our supreme court, together with this writ.

And by the tenor of these presents, we command the sheriff of the county of —, that at a certain day and place, or at certain days and places, which you shall make known to him, he cause to come before you, or any two of you, so many and such good and lawful men of his bailiwick as you shall direct, by whom the truth of the matters aforesaid may be the better inquired into.

APPENDIX OF PRECEDENTS.

Witness J. P., one of the justices of said court, at —, the — day of —, 18—.

J. C., Attorney:

J. W. H., Clerk.

[Indorsed.]

By the court

J. W. H., Clerk.

[Return to commission.]

The execution of this commission appears in the schedule hereto annexed.

Dated —.

H. M.

T. R.

W. F.

Commissioners.

Names of the jurors summoned to inquire according to the tenor of the precept hereto annexed.

[Names of jurors.] (a)

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No. 543.

*Inventory to be filed by committee.*

See Vol. II., p. 239, and note 23.

[Similar to that of a general guardian. See No. 525.]

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No. 546.

*Annual account of committee.*

See Vol. II., p. 239, and note 23.

[Similar to that of a general guardian. See No. 526.]

(a) The text (see Vol. II., pp. 656 to 665,) contains full forms for the proceedings on the execution of the commission; forms of *inquisition*, and of the proceedings for the *appointment of a committee*, and of his *bond. commission*. etc. These forms can easily be adapted to the present practice; and it is therefore not necessary to repeat them.

No. 547.

*Notice of motion for leave to traverse inquisition, or that an issue be awarded.*

See Vol. II., p. 235, and note 15.

In the matter of H. E., an alleged lunatic [or, <i>idiot, etc.</i> ]	}
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Sir :

Take notice that a motion will be made, at the next special term of this court, to be held at the —, in —, on the — day of — next, at — o'clock in the —noon, for an order that H. E., have leave to traverse the inquisition in this matter; or that an issue may be awarded to try the fact of the lunacy [or, *idiocy*] of the said H. E., and whether he is capable of governing himself or managing his affairs, and that said H. E. be allowed, out of his estate, a reasonable sum to defray the costs and expenses of trying said issue, and the costs of this application. And for such other or further relief as the court may think proper to grant, which motion will be founded upon the inquisition in this matter, and upon the petition and affidavits, with copies of which you are herewith served.

Dated —.

J. C., Attorney for H. E.

[*Address to committee.*]

No. 548.

*Order directing an issue of fact.*

At a special term, etc.

[*Title as in No. 547.*]

On reading and filing the petition of the above named H. E., dated the — day of —, 18—, praying [or, *notice of motion*] for an order directing an issue to try the question whether [the said H. E. is a lunatic [or, *idiot, or, habitual drunkard*] and incompetent to govern himself or manage his affairs; and on reading and filing the affidavits of —, in support of said petition [or, *motion*]; it is, on motion of —,

attorney for said H. E., after hearing —, in behalf of the committee of the said H. E., *ordered*, that an issue be made up and settled to try the question, whether the said H. E. be a lunatic [or, *idiot*, or, *an habitual drunkard*,] and incapable of governing himself, or managing his affairs; and that the said issue be tried at the next circuit court to be held in and for the county of —.

And it is *further ordered*, that the attorney for the said H. E., in the first instance, prepare the issue and submit it to the attorney of the said committee, and that if they cannot agree as to its form, etc., application be made to this court; and that if the attorney for the said H. E. shall omit to prepare such issue, and to serve the same on the attorney for said committee within twenty days after service of a copy of this order, then the order for an issue shall be deemed discharged.

And it is *further ordered* that the said committee pay to the attorney of said H. E. the sum of — dollars; and also pay to said H. E., or to his attorney, such further reasonable sums as shall be requisite to procure the attendance of witnesses upon the trial of said issue, and for the employment of proper counsel before the court and jury.

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No. 549.

*Order referring it to a referee to settle issues.*

At a special term, etc.

[*Title as in No. 547.*]

On reading and filing petition of H. E., for leave to traverse the inquisition in this matter, etc., which petition bears date on the — day of —, on motion of —, attorney for the petitioner, it is *ordered* that it be referred to W. O., Esq., of —, as referee, to settle the issues upon the several questions of fact arising upon said petition, and to report the same to the court, with all convenient speed.

And it is *further ordered* that said issues, when so settled and reported to this court, be tried at the next circuit court, to be held in and for the county of —.

No. 550.

*Order superseding commission, etc., on the verdict of a jury.*

At a special term, etc.

[Title as in No. 547.]

On the coming in and filing and entering the verdict of the jury on the issues of fact in this matter, whereby it is found that, etc., [state substance of finding of the jury,] and after hearing counsel for the parties herein, on motion of —, of counsel for the petitioner, on the said traverse, it is *ordered* that the commission of lunacy [or, *idiocy*] heretofore issued out of and under the seal of this court, against H. E., and bearing date on the — day of —, 18—, and the inquisition and other proceedings thereon taken, be and the same are hereby superseded, etc.; and that R. B., the committee, be, and he hereby is, discharged from the further execution of the powers and duties of his trust as said committee.

And it is *further ordered* that it be referred to —, Esq., of —, to take and state the account of said R. B., committee of the person and estate of the said H. E., and for that purpose to summon the said R. B. before him, the said referee, and examine him on oath touching his accounts as such committee, and to produce before him, the said referee, the books, papers and vouchers of said committee, and ascertain what (if any) balance is due from said committee, and report thereon to this court with all convenient speed.

[And it is *further ordered* that the question of costs, and all other questions, be reserved until the coming in of the report of said referee.]

No. 551.

*Petition to set aside inquisition, etc., for irregularity.*

[Title as in No. 547.]

To the Supreme Court of the State of New York.

The petition of H. E., of —, respectfully shows, that under and by virtue of a commission in the nature of a writ *de lunatico* [or, *idiota*] *inquirendo*, heretofore issued out of and under the seal of this court, and an inquisition taken thereon, your petitioner was found to be a lunatic [or, *idiot*, or, *habitual drunkard* ;] and such proceedings were

thereupon had and taken that, said inquisition having been confirmed by the court, one R. B. was appointed committee of the person and estate of your petitioner, by an order of this court, bearing date on the — day of —, 18—, on filing the security mentioned in said order; and that such security has been duly filed.

Your petitioner further shows, that no notice of the issuing of such commission, or of the hearing or trial thereon, or of the appointment of said committee, was served on your petitioner, [and that he had no knowledge of said proceedings until after said inquisition was taken, to wit, on the — day of —, 18—, or, *that the commissioners interfered with the sheriff in the discharge of his duties in selecting the jury*; or, any other irregularity.]

Wherefore, your petitioner prays that the said inquisition and finding of the jury, together with all subsequent proceedings in this matter, including the order appointing said committee, be set aside, on account of the aforesaid irregularity; to the end that your petitioner may be enabled to come in and contest said application, and have an opportunity to appear and be heard on the execution of said commission; or for such other or further relief in the premises as the court shall think proper to grant; together with costs of this motion, against the applicant for said commission.

And your petitioner, etc.

H. E.

Dated —.

[To the usual verification (see No. 489) add the following: And I further certify that I have examined the said H. E. for the purpose of ascertaining the state of his mind, and whether he is capable of understanding the nature and object of said petition; and find that he is apparently of sound mind, and capable of understanding the same.]

G. A., Commissioner of deeds.

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No. 552.

*Order upon No. 551.*

At a special term, etc.

[*Title as in No. 547.*]

On reading and filing the petition of the above H. E., duly verified, bearing date the — day of —, 18—, and proof of due service of

notice of this application on F. E. [or, *on the attorney for F. E.*] the petitioner in this matter, and on R. B. the committee; and no one appearing to oppose, [or, *after hearing counsel for the respective parties,*] on motion of —, counsel for the petitioner herein, it is *ordered* that the inquisition heretofore taken in this matter and filed in the office of the clerk of the county of —, on the — day of —, and all subsequent proceedings, including the order appointing the said R. B. committee, be, and the same hereby are, set aside for irregularity. And it is *further ordered* that the said F. E., the petitioner in said proceedings, pay to the said H. E., the petitioner herein, the sum of ten dollars, costs of this motion.

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No. 553.

*Petition, by committee, for leave to partition real estate of lunatic, etc.*

See Vol. II., p. 244.

To the Supreme Court of the State of New York.

The petition of R. B., of —, respectfully shows: That on the — day of —, 18—, your petitioner was duly appointed committee of the person and estate of H. E., a lunatic [or, *idiot, or, an habitual drunkard,*] by an order of this court, dated on that day, upon his executing and filing the security mentioned in said order; that such security has been duly given and filed, as required by said order, and your petitioner thereupon entered upon the duties of his trust, as such committee.

That said H. E. is seised, as the owner in fee simple, as tenant in common with [*name other owners*] of an equal undivided one-fourth part of the following described premises and real estate, situated, etc. [*describing it.*]

That said premises are worth about the sum of — dollars, and the net annual income thereof is about the sum of — dollars; and that said H. E. has no other real estate.

That said premises are so situated that a partition thereof between the owners is practicable. That the other tenants in common are of full age, and are desirous of agreeing to a partition of said premises; and that one of said tenants in common, to wit, G. B., insists upon such partition, and is about to commence an action therefor, unless your petitioner shall be authorized to agree to a partition of said



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premises; and that such action will necessarily be attended by far greater expense, and will otherwise be less advantageous to the interests of said H. E. [or, *state any other fact showing that H. E. will be benefited, and whether premises can be divided.*]

Wherefore, your petitioner prays that he may be authorized and directed, pursuant to the statute in such cases made and provided, as the committee for and on behalf of said H. E., to agree to a division and partition of said premises; or for such other or further relief as the court shall think proper to grant.

And your petitioner, etc.

Dated —.

R. B., Committee of H. E.

[Add verification as in No. 489.]

*Affidavit of co-tenant annexed.*

— county, ss. R. E., of —, in said county, being duly sworn, deposes and says: That he has heard read the above [or, *annexed*] petition, and that the same is true to the best of deponent's knowledge, information and belief. That deponent is one of the tenants in common and joint owner of the premises in said petition described; that he is of full age, and desires a partition thereof; that he and the other co-tenants of full age, are willing to agree with the said committee to a division of the said premises. That in the opinion of this deponent the said premises are so situated that they are capable of being fairly partitioned between the joint owners.

Sworn, etc.

R. E.

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No. 554.

*Order of reference thereon.*

At a special term, etc.

In the matter of the petition of R. B., committee of the person and estate of H. E., a lunatic [or, *idiot*, etc.] for leave to partition the real estate of the said H. E.

On reading and filing the petition of R. E., the committee of the person and estate of H. E., a lunatic [or, *idiot*, etc.] duly verified,

bearing date the — day of —, 18—, [*and the affidavit of —, annexed*], on motion of —, attorney for the petitioner, it is *ordered* that it be referred to W. O., Esq., of —, to inquire into and ascertain the truth of the matters set forth in said petition, and that he report, with his opinion thereon, to this court, with all convenient speed. And if said referee shall find that said real estate is so circumstanced that a partition thereof can be made, and that such partition will be for the interest of said lunatic [or, *idiot*, etc.], then that he ascertain and report the right, title and interest of said lunatic [or, *idiot*, etc.] in and to said premises, and the several shares or quantity of interest to which each of said tenants in common will be entitled, with such other facts and circumstances in regard thereto as such referee may deem proper to enable the court to make such order in the premises as the nature of the case may require.

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No. 555.

*Report of referee thereon.*

[*Title as in No. 554.*]

To the Supreme Court of the State of New York.

Pursuant to an order of reference in this matter, bearing date on the — day of —, 18—, whereby it was referred to me to inquire into and ascertain the truth of the matters set forth in the petition in this matter, and to report, with his opinion thereon, to this court, and that if I should find that the real estate described in said petition was so circumstanced that a partition thereof could be made, and such partition would be for the interest of said lunatic [or, *idiot*, etc.,] then that I should ascertain and report the right, title and interest of said lunatic [or, *idiot*, etc.,] in and to said premises, and the several shares or quantity of interest to which each of the tenants in common would be entitled, etc. I, the subscriber, the referee aforesaid, do respectfully report, that having been attended by the said committee and his attorney and taken testimony upon the matters alleged in said petition and required by said order to be examined, I am satisfied that the facts set forth in said petition are true, and that the premises mentioned in said petition are so circumstanced that an actual partition thereof can be made, and that the interest of said lunatic [or, *idiot*, etc.] requires a partition thereof.

I further report that the said lunatic [or, *idiot*, etc.] is seized, as tenant in common, of the equal undivided one-fourth part of said premises, and that each of the other tenants in common are, in like manner seized of an equal undivided one-fourth part of the same; and that there is no dower interest or other interest or estate in remainder or reversion, in said premises; and that partition thereof can be made by dividing said premises into four equal parts, and allotting one of said parts to each of said tenants in common.

All which is respectfully submitted.

Dated ———.

W. O., Referee.

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No. 556.

*Order directing committee to agree to partition, and to convey.*

At a special term, etc.

[*Title as in No. 554.*]

On reading and filing the report of W. O., Esq., referee in this matter, bearing date ———, whereby it appears that the premises mentioned in the petition in this matter are so circumstanced that an actual partition thereof can be made, and that the interest of said lunatic [or, *idiot*, etc.] requires a partition thereof; on motion of ———, of counsel for the petitioner, it is *ordered*, that the said report be, and the same is; in all things confirmed. And it appearing to the court, therefrom, that partition of said premises can be made by dividing the same into four equal parts, and allotting one of such parts to each of the tenants in common thereof; it is *further ordered*, that said R. B., committee of the person and estate of H. E., be authorized, empowered and directed to agree with the said tenants in common, to wit, [*naming them*] for such partition and division of said real estate, and for the assignment of one portion thereof to the said H. E.; and on such partition being made, and on the said other tenants in common executing to said H. E., and delivering to said committee, duly acknowledged, their several releases and conveyances of all their rights, titles and interests in and to the part of said premises so allotted to said H. E., that said R. B. as such committee of H. E. be, and he hereby is, authorized, empowered and directed to execute, in the name and on behalf of said H. E., and unite with the other tenants in common in executing a release and quit-claim of all the right, title

and interest of the said H. E. in and to the several portions allotted to said other tenants in common.

And it is *further ordered*, that said committee report, on oath to the court, his proceedings under this order with a particular description, by metes and bounds, of the portion of said premises allotted to each party in interest, respectively.

The following is a description of the premises to be partitioned, [*insert description.*]

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No. 557.

*Release and conveyance, by committee.*

This indenture, made this — day of —, 18—, between H. E., a lunatic [or, *idiot*, etc.,] by R. B., committee of his person and estate, duly appointed by the supreme court of the state of New York, of the first part, and J. K., of —, of the second part.

Whereas, by an order of the said supreme court, made on the — day of —, 18—, upon a petition by said R. B. for leave to partition the real estate of the said H. E., the said party of the first part was authorized and empowered to make partition and division of the premises mentioned and described in said order, and of which an equal one-fourth part is hereby conveyed, and to execute, in the name and on behalf of said H. E., a release and quit-claim of all the right, title and interest of the said H. E. in and to the several portions allotted to the other tenants in common.

And whereas, by virtue and in pursuance of said order, a partition and division of said premises has been made by and between the said R. B., committee as aforesaid, and the other tenants in common of said premises, by the terms of which said division and partition, an equal undivided one-fourth part of said premises was allotted to said H. E., and a like share to each of the other tenants in common thereof.

Now therefore, this indenture witnesseth that the said party of the first part in consideration of the premises, and by virtue of the orders of the said supreme court hereinbefore recited, and of the statute in such case provided, and in consideration of the sum of one dollar to him paid at or before the execution of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained and sold,

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remised, released and conveyed, and by these presents doth grant, bargain and sell, remise, release and convey unto the said party of the second part, his heirs and assigns all that certain, [*describe premises.*] And also all the right, title and interest, property, possession and claim of the said H. E., of, in and to the same, and every part and parcel thereof, with the appurtenances. To have and to hold the same, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns; to his and their only proper use, benefit and behoof forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

Sealed and delivered in } H. E. [L. s.]  
 presence of. } By R. B., his committee

[Add usual acknowledgment.]

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No. 558.

*Final report by committee, of partition, etc.*

[*Title as in No. 554.*]

To the Supreme Court of the State of New York.

Pursuant to an order of the court in this matter, bearing date —, whereby I, the subscriber, committee of the person and estate of H. E., a lunatic [or, *idiot*, etc.,] was authorized, empowered and directed to agree with the tenants in common of the premises mentioned in the petition in this matter, to wit, [*naming them,*] to a partition and division of said real estate, and to the assignment of one-fourth part thereof to such of the tenants in common, including the said H. E., and to execute in the name and on behalf of the said H. E., a release and quit-claim of all said H. E.'s title to and interest in the several portions allotted to the other tenants in common, on receiving similar releases from them in respect to the share allotted to said H. E., respectfully report:

That I have made partition with said [*naming the co-tenants*] the other tenants in common of the said premises, according to the respective rights and interests of the several parties, agreeably to the directions contained in said order. That we have divided the whole of said premises into four allotments, which are designated on the map

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hereto annexed by the letters A, B, C and D, each of which allotments is, in my opinion, of equal value, and that being, in my judgment, the most beneficial division that could be made of the premises. That we have agreed to set off, and have set off, in severalty to the said H. E. that portion of said premises designated on said map by the letter A, and which is bounded as follows: [*insert description.*] That we have also agreed to set off, and have set off in severalty to said —, etc. etc. [*proceeding in same manner as to all.*]

I further report that I have executed in the name and on behalf of said H. E. a release and conveyance of all his right, title and interest in and to said several portions marked on said map B, C and D, to the several parties entitled thereto, and have taken from them, respectively, their releases and conveyances of their several rights, titles and interests in and to the said portion allotted to said H. E., and marked A on said map.

All of which is respectfully submitted.

Dated —.

R. B., Committee.

[Add verification.]

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No. 559.

*Order confirming final report of committee.*

At a special term, etc.

[*Title as in No. 554.*]

On reading and filing the report of R. B., committee of the person and estate of H. E., a lunatic [or, *idiot*, etc.] bearing date on the — day of —, 18—, and on motion of —, attorney for said committee, it is *ordered* that the said report be, and the same hereby is, in all things ratified and confirmed.

And it is *further ordered* that the partition so made by him be firm and effectual forever.

CHAPTER VII.

ACTIONS TO DISSOLVE MARRIAGE, OR FOR DIVORCE.

No. 560.

*Complaint in action to dissolve marriage because of non-age.*

See Vol. II., p. 246, and note 2.

[*Name of court.*]

A. B., an infant, by R. B., his guardian, plaintiff, <i>against</i> C. B., defendant.
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The plaintiff, complaining of the defendant, alleges that the plaintiff is an infant, under the age of twenty-one years.

That on the — day of —, 18—, at —, upon application duly made on his behalf, the said R. B. was, by an order of this court [or, *by an order made by Hon. —, a justice of this court, or, by Hon. —, county judge of — county,*] duly appointed the guardian of the plaintiff, for the purposes of this action.

That on the — day of —, 18—, at —, the plaintiff was married to the defendant.

That at the time of such marriage they were, and ever since have been, inhabitants of this state.

That at the time of such marriage the plaintiff had not attained to the age of [*if the female, say, twelve; if the male, say, fourteen*] years, but was of the age of — years only, on the — day of — last past; and was incapable of contracting marriage.

That since the plaintiff has attained to the age of [twelve] years [she] has never, voluntarily or freely, cohabited with defendant.

Wherefore, the said plaintiff demands judgment that the said mar-

riage be annulled, and declared void, according to the statute in such case made and provided, with costs of this action; [*if action is by the male, add: and that the said defendant may be adjudged to be not entitled to dower in any portion of the plaintiff's real estate, or entitled to any interest, or distributive share in the plaintiff's personal estate, in case of his death intestate;*] and that the plaintiff may have such further or other relief in the premises as shall be equitable, and the circumstances of the case may require.

J. C., Plaintiff's attorney.

[Add verification as in No. 1.]

No. 561.

*The like—because of a former marriage.*

See Vol. II., p. 246, and note 3.

[*Title of cause.*]

The plaintiff, complaining of the defendant, alleges the following facts constituting his cause of action: [*allege marriage and residence of the parties as in No. 560.*]

The plaintiff further alleges, on his information and belief, that on the — day of —, 18, the said defendant and one M. D. were married, at —, in the state of New York; and that they cohabited together, as husband and wife, for about — years after said marriage, and until the — day of —, 18—, since which time, and for more than five successive years prior to the said marriage between this plaintiff and the defendant, the said M. B. remained absent from said defendant, and she had not, up to the time of said marriage with the plaintiff, seen or heard from or of the said M. D. within that time, but supposed him to be dead, having been so informed; and that the said marriage with the plaintiff was contracted under that supposition, and in good faith, by both parties. That the plaintiff is also informed and believes, that the said M. D., the said former husband of the defendant, is still living, and resides at —, and has visited the defendant in this action, and claims her as his wife; and the plaintiff so charges the fact to be.

The plaintiff further alleges that there are two children, the issue of his said marriage with the defendant, to wit, — of the age of — years, and — of the age of — years.



Wherefore the plaintiff demands judgment that the said marriage between him and the defendant be annulled and declared void; that the said defendant be adjudged not entitled to dower in the plaintiff's real estate, or to any distributive share or interest in his personal estate, in case of his death intestate; that the said marriage be adjudged to have been contracted in good faith, with the belief of the parties thereto that the said former husband was dead; that the children of the said marriage —, and —, be adjudged legitimate, and entitled to succeed to the plaintiff's real and personal estate as though said marriage had been valid, and that the plaintiff be awarded the care and custody thereof; or for such other or further relief as shall be equitable and just.

J. C., Plaintiff's attorney.

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No. 562.

*The like—because of lunacy.*

See Vol. II., p. 247, and note 4.

[*Title of cause.*]

The plaintiff, complaining of the defendant, alleges: [*allege marriage and residence of parties as in No. 560.*]

That for several years previous to the said marriage, and at the time the same took place, the plaintiff was a lunatic, and of unsound mind, and incapable of contracting matrimony. That at the time said marriage took place, it was well known to the said defendant that the plaintiff was a lunatic, and that he was incapable of consenting to such marriage. That the said defendant had been a near neighbor of the plaintiff, for several years, and had notice of his mental incapacity.

That the plaintiff is now recovered of his lunacy aforesaid, and restored to his right mind, memory and understanding, and has been so for about — months last past.

That the plaintiff has not since his restoration to a sound state of mind as aforesaid, cohabited with the said defendant.

Wherefore the plaintiff demands judgment that the said marriage between him and the defendant may be dissolved, and declared null and void, by the judgment of this court, according to the statute in

such case made and provided; and that the plaintiff may have such further or other relief as shall be just and equitable, together with the costs of this action.

(Add verification.)

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No. 563.

*The like—because of fraud.*

See Vol. II., p. 248, and note 7.

[*Title of cause.*]

The plaintiff complains of the defendant, and alleges, [*allege marriage and residence of parties as in No. 560.*]

That prior to, and at the time of said marriage, and as an inducement to the plaintiff to enter into said marriage, the defendant falsely and fraudulently represented herself to be a chaste and virtuous woman, which representation the said plaintiff believed to be true; and that she concealed from the plaintiff the fact that she was the mother of illegitimate children, of which fact the plaintiff was wholly ignorant.

The plaintiff further alleges, that he entered into such marriage, relying on such fraudulent representations; that at the time of the said marriage, the said defendant was unchaste and the mother of two illegitimate children; that the defendant fraudulently concealed this fact from the plaintiff; and that he only discovered it on or about the — day of —, 18—, since which discovery, he has not cohabited with the said defendant as his wife.

[*Demand of judgment as in No. 562.*]

(Add verification.)

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No. 564.

*Affidavit of non-cohabitation, for order of reference, in case of non-age.*

See Vol. II., p. 251, and note 12; Rule 87.

[*Title of cause.*]

— county, ss. A. B., being duly sworn, says, that he is the above named plaintiff; that this is an action to annul a marriage on the

ground that this deponent was under the age of legal consent, when the marriage took place; that he has now attained the age of consent, being about [fifteen] years of age; that he and the said defendant have not cohabited as husband and wife for any time, since or after this deponent attained the age of consent.

Sworn, etc.

A. B.

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No. 565.

*The like—in case of lunacy, after restoration.*

See Vol. II., p. 251, note 12.

[*Title of cause.*]

— county, ss. A. B., being duly sworn, says, that he is the above named plaintiff; that this is an action to annul a marriage on the ground (\*) that this deponent was a lunatic, when the marriage took place; that this deponent has recovered from his lunacy, and been restored to his right mind, memory and understanding, and has been so for about — months last past; that he and the above named defendant have not cohabited as husband and wife since this deponent was restored to his reason, to wit, since the — day of —, 18—.

Sworn, etc.

A. B.

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No. 566.

*The like—where lunacy still continues.*

[*Title of cause.*]

— county, ss. J. G., being duly sworn, says: That he is a physician; that he knows the above named plaintiff, and has been his family physician for several years, and has attended him regularly since the — day of —, 18—; that said plaintiff has been, for some years past, and since about the year —, a lunatic [or, *an idiot*,] deprived of his reason and understanding, and, in the opinion of deponent, still continues to be so.

Sworn etc.

J. G.

No. 567.

*The like—in case of force or fraud.*

See Vol. II., p. 251, and note 12.

[*Title of cause.*]

[*As in No. 564 to the (\*), then add:*] Of fraud [or, *force* ;] that there has been no voluntary cohabitation between this deponent and the defendant as husband and wife, since the discovery of the facts constituting the fraud ; [or, in case of *force*,—*that there has been no voluntary cohabitation, etc., at any time.*]

No. 568.

*Order of reference to take proofs, under Rule 87.*

See Vol. II., p. 251, and note 12.

At a special term, etc.

[*Title of cause.*]

On reading and filing proof that the summons has been served, more than twenty days since, and that the defendant has failed to answer within the time required by law [or, *the answer herein not denying any facts charged in the complaint,*] and of due notice of motion, to defendant's attorney, and on reading and filing an affidavit of continued lunacy [or, *idiocy,*] of the plaintiff [or, *an affidavit of non-cohabitation after the plaintiff was restored to reason ; or, an affidavit of the plaintiff that the parties to this action have not cohabited for any time, as husband and wife, after the plaintiff had attained the age of consent ; or, after the discovery of the fraud, etc., etc.,*] and on motion of — of counsel for the plaintiff ; it is *ordered* that it be referred to W. O. of —, as referee, to take proof of all the material facts charged in the complaint, and report thereon, with the proof taken by him, to this court.

No. 569.

*Report of referee, upon No. 568.*[*Title of cause.*]

To the Supreme Court of the State of New York.

In pursuance of an order of this court, made in the above entitled action, on the — day of —, 18—, by which it was referred to me, as referee, to take proof of all the material facts charged in the complaint, and report thereon, with the proofs; I, the referee aforesaid, do hereby report:

That I have taken proofs in this action, on the part of the plaintiff; which proofs are hereto annexed and form a part of this report.

That in my opinion all the material facts charged in the complaint are true, and have been fully proved and established before me. That the said A. B. was a lunatic [or, *an idiot*, or, *under the age of consent* etc., etc., *as the case may be*] at the time of his marriage with the defendant as stated in the complaint in this action.

All of which is respectfully submitted.

Dated —.

W. O., Referee.

[Annex depositions.]

No. 570.

*Final judgment of nullity of marriage, because of non-age.*

See Vol. II., p. 252, and note 13.

At a special term, etc.

[*Title of the cause.*]

This cause having been brought on for final hearing, upon the report of the referee herein, bearing date the — day of —, 18—; [*and the interlocutory order, dated the — day of —, or, upon the decision of the judge who tried the said cause; or, upon the verdict of the jury, on the issues of fact, etc., as the fact may be,*] and upon the proceedings, and the proofs annexed to said report; now, therefore, on motion of —, attorney for the plaintiff, due proof of service of notice of this application having been made, [*or, after hearing counsel for the parties,*] it is *adjudged* (\*) that the marriage between the said plaintiff, A. B., and the defendant C. B. be, and the same hereby is, declared wholly

null and void, from the date of this judgment, because of the (†) non-age of the plaintiff; and that the parties, plaintiff and defendant, are free from the obligations of marriage with each other.

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No. 571.

*The like—in case of a former marriage.*

[As in No. 570 to the (\*), then continue to the (†); and instead of the words “non-age of the plaintiff,” say—former marriage of the defendant to a husband who is still living; concluding as follows] and it is further adjudged that said marriage was contracted in good faith, and with the belief of the parties thereto that M. D., the former husband of the said defendant, was dead.

And it is *adjudged*, also, that — and —, the children of the said marriage hereby annulled, are legitimate, and entitled to succeed to the real and personal estate of said plaintiff, as though said marriage had been valid; and that the plaintiff have the care and custody of said children; and that said defendant is not entitled to dower in the real estate of said plaintiff, nor to any distributive share or interest in his personal estate, in case of his death intestate.

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No. 572.

*The like—in case of lunacy, or idiocy.*

At a special term, etc.

[*Title of cause.*]

This action having been brought on to be heard upon the pleadings and proceedings and the report of W. O., Esq., referee, with proofs annexed, made and filed on the — day of —; now, on due proof of service of notice of hearing, and on motion of —, attorney for the plaintiff, no one appearing to oppose, it is *ordered* and *adjudged* that the marriage between the said plaintiff, A. B., and the said defendant, C. B., be, and the same hereby is declared wholly null and void, from the date of this judgment, because of the lunacy [or, *idiocy*] of the

plaintiff; and that the parties, plaintiff and defendant, are free from the obligations of marriage with each other.

[*If there be children of the marriage, add:*]

And it is *adjudged* that — and —, children of the said marriage, are entitled to succeed to the real and personal estate of the said defendant.

And as to costs, it is *adjudged*, etc., [*state the allowance, if any.*]

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## No. 573.

*The like—in case of physical incapacity.*

[*As in No. 570 to (\*), then add:*] that the marriage between the said plaintiff, A. B., and the said defendant, C. B., is wholly null and void, because of the physical incapacity of the defendant; and that the said parties, plaintiff and defendant, are free from the obligations of marriage with each other.

And as to costs, it is *adjudged* [*state the allowance, if any.*]

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## No. 574.

*The like—in case of force or fraud.*

[*As in No. 570 to (\*), then add:*] that the marriage between the said plaintiff, A. B., and the defendant, C. B., was obtained by force [or, *fraud*] on the part of the defendant, and the same is utterly null and void from the date of this judgment; and is hereby dissolved, and that the parties, plaintiff and defendant, are free from the obligations of marriage with each other.

It is further *adjudged* that the custody of L. B., the child of said parties, be committed to the plaintiff; and that the said defendant do pay to the said plaintiff the sum of — dollars, yearly, in semi-annual payments, for the education and maintenance of said child, until the same shall arrive at the age of twenty-one years, or until the further order of the court, and give security therefor to the clerk of this court, to be approved by a justice of this court. And it is *adjudged* that the defendant pay to the plaintiff — dollars, hereby *adjudged* as the costs of this action.

No. 575.

*Complaint, in action by wife, for divorce because of adultery.*

See Vol. II., p. 256, and notes 19, 20, 21.

[*Title of cause.*]

The plaintiff complains of the defendant, and alleges the following facts constituting her cause of action.

That on the — day of —, 18—, at — [in this state,] the plaintiff was duly married to the defendant, and continued to live with him, as his wife, until about the — day of — last.

That the plaintiff and the defendant were, at the time of the commission of the several acts of adultery hereinafter mentioned, and now are, residents of this state.

That the plaintiff is informed and believes, and charges the truth to be, that the said defendant, disregarding the solemnity of the marriage vow, hath, since the marriage of the plaintiff with him, as aforesaid, committed adultery, at divers times and places, and especially, that he, on the — day of —, 18—, [or, *on some day or days during the year 18—, and about the month of —, in that year, but on what particular day or days, the plaintiff is ignorant*] at the house of one — in — street, in the city of —, did commit adultery and have carnal connection with one —; and that the said defendant, at various other times during the said year 18—, committed adultery and had carnal connection with the said — [and other women whose names are unknown to the plaintiff] at certain other places in said city, to the plaintiff unknown.

That such adultery was committed without the consent, connivance, privity or procurement of the plaintiff, and the plaintiff was ignorant of the commission of said acts of adultery, or either of them, by the defendant, until about the — day of — last. That five years have not elapsed since she discovered the fact that such adultery had been committed by the defendant; and that she has not voluntarily cohabited with him since the discovery thereof.

The plaintiff further shows, that she is informed and believes, that the said defendant is now, and for some time past has been, living with one [or, *the said,*] —, in open and notorious adultery, at —, and that five years have not elapsed since the commencement of such adulterous intercourse was discovered by the plaintiff. And the plaintiff alleges that such adulterous intercourse, between the defendant



and the said —, was begun and is continued without the consent, connivance, privity or procurement of the plaintiff. (\*)

That there are no issue of the said marriage of the plaintiff and defendant, [or, *that the issue of the said marriage of the parties hereto are two children, named —, aged —, and — aged — years.*]

Wherefore the plaintiff demands judgment that the marriage between her and the said defendant may be dissolved, and a divorce adjudged, according to the statute in such case made and provided; that the custody of the children of the marriage be awarded to the plaintiff; and that the defendant may be compelled, by the judgment of this court, to make a proper and suitable provision for the support and maintenance of the plaintiff; and that the plaintiff may have temporary alimony, and the costs of this action; and such further relief in the premises as may be just and equitable.

J. C., Plaintiff's attorney.

[Add verification as in No. 1.]

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No. 576.

*The like—by husband against wife.*

[*Title of cause.*]

[*As in No. 575 to the (\*), then continue thus:*] and the plaintiff further shows, that during the time he cohabited with the said defendant, as his wife, she had three children, to wit, M. B., aged about ten years, N. B., aged about eight years, and F. B., aged about two years; that the said children M. B. and N. B. were born while this plaintiff and said defendant were cohabiting together as husband and wife; but that the said child F. B. was born on the — day of —, 18—, at —, while the defendant was living in adultery with the said —, and that the plaintiff was absent from the state of New York for more than one year before its birth, during all which time the defendant was living within this state.

Wherefore, the plaintiff demands judgment, that the marriage between him and the defendant may be dissolved, and a divorce decreed; that the said infant child, F. B., may be adjudged and declared illegitimate; and that the plaintiff may have such further relief in the premises as shall be just and equitable.

## No. 577.

*Affidavit for order of publication, in suit for divorce.*[*Title of cause.*]

— county, ss. A. B., the plaintiff in the above entitled action, being duly sworn, says, that this action is for a divorce, on the ground of adultery, and the place of trial laid in the complaint is the county of —, where the plaintiff resides; that said defendant is not a resident of the state of New York, but resides at —, in the state of [Ohio,] and is not to be found within this state, to the knowledge, information or belief of deponent.

Sworn etc.

A. B.

## No. 578.

*Answer—general denial, and setting up adultery of plaintiff.*

See Vol. II., p. 258, and note 22.

[*Title of cause.*]

The defendant, in answer to the complaint of the plaintiff in this action:

*First.*—Admitting the marriage between the parties alleged in the complaint, denies each and every other allegation of said complaint.

*Second.*—Denies each and every allegation in said complaint contained, relative to her having committed adultery with the persons named in said complaint, or either of them. (\*)

*Third.*—For a third and further defence, the defendant alleges, on information and belief, that the said plaintiff, on her part, disregarding the solemnity of the marriage vow, hath, since the marriage between the parties hereto, committed adultery, [*allege the adultery as in No. 576 to (\*)*, substituting “*plaintiff*” for “*defendant*,” and *vice versa*, then continue thus:] which said several acts of adultery the defendant sets up and insists upon by way of counterclaim, and demands that the marriage of the plaintiff and defendant be dissolved, and a divorce adjudged in favor of the defendant, by a judgment permitting the defendant to marry again, as though said plaintiff were dead; but prohibiting the plaintiff from marrying again, until the death of the defendant, and debarring said plaintiff of her right of dower and interest in the estate of said defendant, and that said defendant be

allowed his costs of this action, out of the separate property and estate of the plaintiff, with such other or further relief as to the court shall seem just and proper.

A. P., Defendant's attorney.

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No. 579. .

*Answer—setting up a condonation.*

[*Title of cause.*]

[*As in No. 578 to the (\*), then add.:*]

*Third.*—That after the times mentioned in the complaint, and before the commencement of this action, the plaintiff being informed as to the matters therein set forth, freely condoned said alleged adultery, and forgave the defendant therefor, [and freely cohabited with him.] That ever since such condonation, the defendant has been a faithful husband to the plaintiff, and has constantly treated her with conjugal kindness.

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No. 580.

*Notice of motion for order of reference, on default of an answer.*

See Vol. II., p. 258, and note 23.

[*Title of cause.*]

Sir :

Please take notice that, upon an affidavit of which the within [or, *annexed*] is a copy, and upon the pleadings and proceedings in this action, a motion will be made, at the next special term of this court, to be held at the — in —, on the — day of — next at ten o'clock in the forenoon, for the usual order of reference to take proof of all the material facts stated in the complaint, and for the relief therein demanded.

Dated —.

J. C., Attorney for plaintiff.

To A. P., Esq., Attorney for defendant.

No. 581.

*Order of reference under Rule 87.(a)*

See Vol. II., p. 258, and note 24.

At a special term, etc., [as in No. 35.]

[*Title of cause.*]

On reading and filing proof of due service of summons more than twenty days since, [by a person more than twenty-one years of age, at —,] as required by Rules 23 and 24, and that the defendant has failed to answer within the time required by law [or, *has put in his (or her) answer which does not deny, (or, admits, and sets up no defence to,) the facts charged in the complaint,*] and on proof of due service of notice of motion on the defendant's attorney, and on motion of J. C. counsel for the plaintiff, it is *ordered* that it be referred to W. O., Esq., of —, as referee, to take proof of all the material facts charged in the complaint, and report thereon, with the proofs so taken by him, to the court, with all convenient speed.

[*If the legitimacy of children be questioned in the complaint, add:*] And that said referee also take proofs upon the question of the legitimacy of E. B. one of the children of the said defendant, as well as upon the other matters stated in the complaint, and also report, with his opinion thereon, and the proofs so taken by him.

[And it is *further ordered*, that the said referee summon before him —, the person by whom the affidavit of service of the summons (and complaint) in this cause, was made, and examine him on oath, in respect to such service, and to report thereon, with his opinion as to the making and the sufficiency of such service.]

[*Where the (verified) complaint does not contain the averments required by Rule 87, add this clause:*]

And that the said referee specially examine the plaintiff, on oath, as to each of the particulars required, by the 87th Rule of this court, to be averred in the complaint, in an action for a divorce.

(a) By the amendment of Rule 87, made in 1874, it is provided that if the defendant fails to answer, or if the facts charged in the complaint are *either expressly or by non-denial, admitted by the answer, and no defence is set up by the answer.* the court shall order a reference, etc.

The amendment is the part in italics. By the same amendment, it is also provided that the court shall not order a reference to a referee agreed upon by the parties; nor without proof, by affidavit, conformably to Rules 23 and 24, of the service of the summons and complaint. And that notice of appearance and retainer shall not be sufficient.

By Rule 23, as amended in 1874, it is required that where the summons and complaint are served by any person other than the sheriff, the affidavit of service must state the age of the person making such service, or that he is more than 21 years of age; and when, and at what particular place, and in what manner, he made the service.

Rule 24, as amended in 1874 requires that in divorce suits, in addition to the requirements of Rule 23, the affidavit shall state what knowledge the affiant had of the person served, being the defendant, and how he acquired such knowledge. And provided that the court may require the affiant to appear in court, or before the referee, if a reference be ordered, and be examined in respect thereto.

(See affidavit of service of summons and complaint, ante, No. 6.)

No. 582.

*Report of referee.*

See Vol. II., p. 258.

At a special term, etc.

[*Title of cause.*]

To the Supreme Court of the State of New York.

In pursuance of an order of this court, made in the above entitled action, on the — day of —, 18—, by which it was referred to me, the undersigned, as referee, to take proof of all the material facts charged in the complaint, and to report thereon, with the proofs taken. I do hereby respectfully report: That I have taken proofs in this action, on the part of the plaintiff, [*and examined the plaintiff on oath,*] and that such proofs are hereto subjoined, and make a part of this report. That in my opinion, all the material facts charged in the plaintiff's complaint in this action are true, and have been sufficiently proved, before me; and that the said defendant has committed the acts of adultery charged in the said complaint, [*and that all the children of the defendant, named in the complaint are legitimate, except E. B., who is not the child of the plaintiff, but is illegitimate.*]

[I further report that I have examined on oath —, the person by whom the affidavit of service of the summons (and complaint) in this action was made, in respect to such service, and am satisfied that such service was made, and was sufficient in form and manner.]

All of which is respectfully submitted.

Dated —.

W. O., Referee.

(Annex proofs taken; each deposition being signed by the witness and sworn to, as follows:)

[*Title of cause.*]

Depositions taken this — day of —, 18—, before me, in the above action, on the part and behalf of the plaintiff.

187—, July —. J. C. appears as counsel for the plaintiff; no one appearing for the defendant.

L. M., a witness produced, was duly sworn by the said referee, and being orally examined by plaintiff's counsel, deposes as follows:

I am acquainted with both the parties to this action, and have known them for about — years, etc. etc.

L. M.

Taken, subscribed and sworn, before }  
me, this — day of —, 187—.

W. O., Referee.

No. 583.

*Interlocutory judgment order for divorce because of adultery; directing a reference as to alimony, etc.*

See Vol. II., p. 259, and note 27.

At a special term, etc.

[*Title of cause.*]

This action having been brought on to be heard upon the pleadings and proceedings and the report of W. O., Esq., referee, with proofs annexed, made and filed on the — day of —, instant; now, on due proof of service of notice of hearing, and on motion of J. C., attorney for the plaintiff, no one appearing to oppose, it is *ordered and adjudged* (\*) that the marriage between the plaintiff, A. B., and the defendant, C. B., be, and the same hereby is, dissolved; and the said parties, and each of them, freed from the obligations thereof. And it shall be lawful for the said plaintiff, A. B., to marry again, as though the said C. B. were actually dead; but it shall not be lawful for the said defendant, C. B., to marry again until the said plaintiff, A. B., is actually dead (†).

And it is *further ordered*, that it be referred to the said referee, W. O., Esq., to inquire into the amount, situation and value of the real and personal property of the said defendant, and as to what would be a reasonable and proper sum to be allowed to the plaintiff for alimony, and for her support and maintenance during her life, and for the support and maintenance of her children, F. B. and G. B., until they shall have arrived at the age of twenty-one years, respectively, and report thereon to this court, with all convenient speed.

Also, that said referee inquire and report in regard to the ages and circumstances of said children, and as to who would be the proper person to take the care and custody of such children; with such other facts in regard thereto as the parties claiming the custody of said children shall bring before said referee, and as to him shall seem pertinent and proper. -

And it is *further ordered* that the question of costs, and all other questions not herein adjudged, be reserved until the coming in of said report, and the final hearing thereon for further directions.

No. 584.

*Report of referee under No. 583.*[*Title of cause.*]

To the Supreme Court of the State of New York.

I, the subscriber, the referee to whom it was referred, by an order of this court bearing date the — day of —, 18—, to inquire and report as to the amount, situation and value of the real and personal property of the defendant, C. B., and as to what would be a proper allowance to the plaintiff for alimony and for her support and maintenance, and for the support and maintenance of her children during their respective minorities; and as to the ages and circumstances of said children, and who would be a suitable and proper person to take the care and custody of them, etc., do respectfully report:

That I have been attended by the attorneys for the plaintiff and defendant; and having heard the allegations and proofs as to the value of the defendant's estate at the time of the commencement of this action, and the allowance proper to be made to the plaintiff, do also report, that the property of the defendant, C. B., consisted, at that time, of a lot of land on — street, in the village of —, on which are two tenements, etc., the whole being estimated at — dollars, and the yearly rent and income thereof is — dollars. That there is a mortgage thereon, for — dollars, at seven per cent. per annum; which the plaintiff did not join in executing. That the whole personal property of the said defendant consists of [*specifying it,*] and its value is about — dollars.

I also report that the two children of the plaintiff and defendant live with, and are entirely supported by, the defendant; one being a boy, aged — years, and the other a girl, about — years of age, and that, etc. [*adding any other particulars that may seem material.*]

I further find and report that, in my opinion, the sum of — dollars per annum, payable semi-annually, is a suitable allowance for alimony and the separate maintenance of the plaintiff; and that that sum should be payable from the date of the said order of reference, on her receipt from time to time.

And that the further sum of — dollars a year would be a suitable and proper sum to be allowed for each of said children, for their support and maintenance, up to the time when each shall arrive at the age of — years; and that in my opinion, from the facts so found and reported by me, their mother, the plaintiff herein, should have

their care and custody up to that time, subject to such directions, from time to time, in respect to such custody and allowance for their support, as the court shall think proper to give.

All which is respectfully submitted.

Dated ———.

W. O., Referee.

No. 586.

*Exceptions to report of referee.*

[*Title of cause.*]

Exceptions taken by the above plaintiff [or, *C. B., the defendant,*] to the report of W. O., Esq., the referee, dated the — day of —, 18—.

*First exception.*—That the said referee has, in and by his said report, reported that —, etc. [*state ground of exception;*] whereas, the said referee ought to have found and reported that —, etc.

*Second exception.*—That the said referee, etc. [*as above,*] whereas, etc.

In all which particulars, the said plaintiff [or, *C. B., the defendant,*] excepts to the said report, and demands that the same may be reversed or modified accordingly.

Dated ———.

J. C., Plaintiff's attorney.

No. 587.

*Notice of hearing and argument upon report and exceptions, and of application for final judgment, etc.*

See Vol. II., p. 259, and note 27.

[*Title of cause.*]

Sir :

Take notice that the report of the referee, herein, made and filed on the — day of —, 18—, and the exceptions thereto, filed the — day of —, 18—, will be brought to argument and hearing at the next special term of this court, to be held at the court house in —, on the — day of — next, at the opening of the court on that day, and [*if notice is by the plaintiff,*] an application will then and there be made for an order to confirm said report, and for final judgment in this action pursuant to the interlocutory order [or, *decision*] of the court, heretofore made in this cause, and to the finding and report of



APPENDIX OF PRECEDENTS.

said referee, together with costs of this action, including costs of such reference and of this motion, [or, *if notice is by party excepting, say :*] and a motion will be made, to reverse and set aside the report of said referee [or, *to modify said report in the several respects pointed out in said exceptions.*]

Dated —.

J. C., Plaintiff's attorney.

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No. 588.

*Notice of motion for issues to be tried by a jury, in a divorce case.*

See Vol. II., p. 259, and notes 25, 26.

[*Title of cause.*]

Sir :

Please take notice that a motion will be made, at the next special term of this court to be held at the court house in —, on the — day of — next, at the opening of the court, on that day, that the issues, a copy of which are hereto annexed and served, arising upon the pleadings in this cause, be settled, and the same ordered to be tried by a jury.

Dated —.

J. C., Plaintiff's attorney.

To A. P., Esq., Deft's attorney.

*Copy proposed issues.*

[*Title of cause.*]

1. Did the defendant in this action commit adultery with one —, at —, on or about the — day of —, 18—?

2. Was such adultery, if committed, condoned by the voluntary cohabitation of the plaintiff with the defendant, after full knowledge of the fact of such adultery?

3. Is the plaintiff living in adulterous intercourse with one —, at the city of —, as alleged by the defendant, in his answer?

4. Have more than five years elapsed since the fact of such adulterous intercourse came to the knowledge of the defendant?

5. Has the defendant voluntarily cohabited with the plaintiff since such discovery?

[6. Is E. B. the legitimate child and issue of the marriage between the plaintiff and defendant?]

J. C., Plaintiff's attorney.

APPENDIX OF PRECEDENTS.

No. 589.

*Order of reference to settle issues.*

At a special term, etc.

[*Title of cause.*]

On motion of J. C., attorney for the plaintiff, and after hearing A. P., counsel for the defendant, in opposition, it is *ordered* that it be referred to W. O., Esq., referee, to settle the issues arising upon the pleadings in this action, upon the several questions of fact proposed by the respective parties in this action.

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No. 590.

*Referee's report of settlement of issues.*

[*Title of cause.*]

To the Supreme Court of the State of New York.

The undersigned, referee to whom it was referred, by an order of the court in this cause bearing date the — day of —, 18—, to settle the issues arising upon the pleadings in this action, respectfully reports the following [or, *the annexed*] as the issues so settled by him, on the several questions of fact proposed by the respective parties.

Dated —.

W. O., Referee.

[*Annex, under title of cause, the issues attached to No. 588, as the same are settled.*]

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No. 591.

*Decision of judge, when cause is tried by the court.*

At a special term, etc

[*Title of cause.*]

This cause having been brought on for hearing and trial before the court, without a jury, upon the issues of fact joined therein, and the proofs and allegations of the respective parties, and arguments of

APPENDIX OF PRECEDENTS.

counsel having been heard and duly considered; I do decide and find as the facts established by the evidence, as follows:

1. That the defendant did commit adultery, etc.

[*Proceed in same manner, as to each fact found.*]

And I do further decide and find, as conclusions of law, from the above facts, as follows: that the plaintiff is entitled to the relief demanded in his complaint, to wit, that the marriage between her and the said defendant be dissolved, according to the statute in such case made and provided. And I further find, as a conclusion of law, that the plaintiff is entitled to a provision, out of the defendant's property and estate, for alimony and the support and maintenance of herself [*and her children;*] and that an order be entered, referring it to W. O., Esq., of —, to inquire into and report (\*) the situation and value of the defendant's estate, and the circumstances of the parties, and what would be a proper and suitable allowance to said plaintiff for permanent alimony, and for her support and maintenance, and the times of payment and manner of securing the same.

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No. 592.

*Notice of motion for judgment and reference, on verdict of a jury.*

[*Title of cause.*]

Sir:

Take notice that upon the pleadings and proceedings in this action, and the verdict of the jury upon the issues therein, filed and entered by the clerk of — county, a motion will be made at the next [*or, present circuit court and*] special term of this court, at —, on —, for final judgment pursuant to the said finding and verdict, [*or, if on behalf of wife claiming alimony, for an interlocutory judgment order, pursuant to said verdict or decision*] and referring it to a referee to be appointed by the court to inquire into and report, [*Continue as in No. 591, from the (\*) to the end.*]

Dated —.

Yours, etc.

J. C., Plaintiff's attorney.

To A. P., Esq., Defendant's attorney.

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No. 593.

*Interlocutory judgment order thereon.*

At a special term, etc.

[*Title of cause.*]

The verdict of the jury upon the issues of fact made and settled, [or, *the decision of the judge, etc.,*] having been duly filed and entered, and this cause having been brought on for hearing thereon, and upon the pleadings and proceedings therein; now, therefore, on motion of J. C., of counsel for the plaintiff, after hearing counsel for the respective parties, it is *ordered and adjudged*, [*Continue as in No 583, from the (\*) to the end.*]

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No. 594.

*Report of referee thereon.*

[*Same, with necessary variations, as No. 584.*]

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No. 595.

*Final judgment for divorce on the ground of adultery.*

See Vol. II., p. 259, and note 27.

At a special term, etc.

[*Title of cause.*]

This action having been tried, on all the issues, before W. O., Esq., referee duly appointed, [or, *by a jury*; or, *by the court—a trial by jury having been waived*;] on reading and filing the pleadings, and the report of the referee [or, *the verdict of the jury*; or, *the decision of the judge, etc.* as the case may be,] by which it appears that the said defendant has been guilty of the acts of adultery charged against him in the complaint in this action; and on motion of J. C., of counsel for the plaintiff, it is *ordered and adjudged*, that the marriage between the said A. B., and the defendant C. B. be, and the same hereby is, dissolved; and the said parties are, and each of them is, freed from the obligations thereof.

And it is further *adjudged* that it shall be lawful for the said plaintiff, A. B. to marry again, in the same manner as though the said defendant, C. B. were actually dead ; but it shall not be lawful for the said defendant, C. B. to marry again, until the said plaintiff, A. B., is actually dead.

And it is *further adjudged* that the defendant pay to the plaintiff, or her attorney, the costs of this action, hereby adjudged at the sum of — dollars. (\*)

[It is *further adjudged* that L. B., the infant child of said defendant, is not the issue of the said marriage between the plaintiff and the defendant, but is illegitimate, and not entitled, in case of the plaintiff's death intestate, to inherit or share any portion of his estate, real or personal.]

And it is *further adjudged* that the said defendant is not entitled to any right or title of dower in the plaintiff's real estate, or to any interest or distributive share in his personal property, in case of his death intestate.

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No. 596.

*The like—in favor of wife, providing for alimony and custody of children.*

[*Same as in No. 604 to the (\*), then add :*] And it is *further ordered* that the defendant pay to the plaintiff the sum of — dollars per annum, from the date hereof, in quarterly payments, for the support and maintenance of the plaintiff and the children of the marriage, named in the complaint, and that he give security to the clerk of this court in the county of —, to be approved by one of the justices thereof, for the payment of the said sum ; but such payment is [*not*] to be in lieu of her right of dower in his real estate, or interest in his personal property, in case of his death intestate ; and that the plaintiff have the care, custody and education of the said children of the marriage, until the further order of this court.

No. 596.

*Complaint in action for a limited divorce, or separation.*

See Vol. II., p. 263, and note 34.

[*Title; commencement; and allegation of marriage, as in No. 575; then add.:*]

That during all the period while the plaintiff and defendant cohabited as husband and wife, this plaintiff faithfully discharged her duties as the wife of the defendant, and at all times treated him with kindness and forbearance; but that said defendant, a few months after said marriage, commenced a course of unkind, cruel and inhuman conduct towards her, which continued until she finally separated from him, on the said — day of —, last.

That on divers occasions, while she lived with said defendant, he was guilty of such cruel and inhuman treatment of her as to render it unsafe and improper for her to cohabit with him; that on the — day of —, 187—, [*specify the particular acts of cruelty.*]

That the said defendant is a man of violent passions and ungovernable temper; that on many occasions he addressed to her the most opprobrious epithets, and threats of personal violence, and he repeatedly threatened to take her life. That in consequence of the cruel and inhuman treatment and threats aforesaid, and such conduct as rendered it unsafe for her to live with, or remain near him, she was obliged, on the said — day of — last, to leave the house of said defendant, and seek refuge with her friends; since which time she has not dared to return to the defendant's house, or live with him.

That the defendant is seised and possessed of real and personal estate to the amount of about — dollars; and that his annual income is at least — dollars. That he has refused to provide for the plaintiff's support and maintenance; [that the plaintiff has no property of her own, and is entirely dependent upon the charity of her friends for support.]

Wherefore, the plaintiff demands that a separation from bed and board, forever, may be adjudged between the plaintiff and defendant, according to the statute in such case made and provided; and that this plaintiff may have the care, custody and education of the children of said marriage, above named; and that the defendant be compelled to make a proper and suitable provision for the support and maintenance of this plaintiff, and the said children. And that the

plaintiff may have such other or further relief, in the premises, as shall be equitable and the circumstances of the case may require.

J. C., Plaintiff's attorney.

[Add verification as in No. 1.]

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No. 597.

*Final judgment for limited divorce, or separation.*

See Vol. II., p. 264, and note 38.

At a special term, etc.

[*Title of cause.*]

This cause having been brought on for final hearing upon the report of the referee herein, bearing date on the — day of —, [*and the interlocutory order made on the — day of —; or, the decision of the judge who tried said cause; or, verdict of the jury on the issues of fact, etc., as the case may be,*] and upon the pleadings, and the proofs annexed to said report; now, therefore, on motion of J. C., attorney for the plaintiff, due proof of service of notice of this application having been made [*or, after hearing counsel for the parties,*] it is *adjudged* that the said plaintiff and defendant be separated from bed and board forever; provided, however, that said parties may, at any time hereafter, by their joint petition, apply to this court to have this judgment modified or discharged; and that neither of said parties shall marry any other person during the life of the other party.

And it is further *adjudged* that the defendant pay to the plaintiff the sum of — dollars per annum, in quarterly payments, for her support and maintenance [*and the support and maintenance of the children of the marriage, named in the complaint;*] and that he give security to the clerk of the county of —, to be approved by one of the justices of this court, for the payment of the said sum; and that the plaintiff have the care, custody and education of the said children of the marriage, until the further order of the court; and that the defendant pay to the plaintiff, or her attorney, the sum of — dollars, hereby *adjudged* as the costs of this action; and that she have execution therefor, according to the rules and practice of this court.

No. 598.

*Petition for alimony, by defendant, in action for divorce on the ground of adultery.*

See Vol. II., p. 268, and notes 41, 42.

[*Title of cause.*]

To the Supreme Court of the State of New York.

The petition of the defendant, C. B., respectfully shows to this court: that the plaintiff, A. B., has commenced this action against your petitioner to obtain a judgment dissolving the marriage solemnized between him and your petitioner, on the ground of the adultery of your petitioner.

That your petitioner has appeared, and put in her answer, under oath, to the complaint herein, denying such adultery.

That your petitioner is wholly destitute of the means of support, or of money for carrying on her defence, or of defraying the costs and expenses thereof; that she is informed and believes that the plaintiff has real estate and personal property to the amount of more than — dollars, and that his annual income, arising from his business of, [*state its nature,*] is about — dollars. [*State number, sex and ages of children, if any, and how far they are dependant upon petitioner.*]

Your petitioner therefore prays that the plaintiff may be ordered to pay your petitioner a reasonable sum for her support and maintenance, during the pendency of this action, and such amount of money as may be necessary to enable her to carry on her defence and to pay the necessary costs and expenses thereof.

And your petitioner will ever pray, etc.

C. B.

[Add verification as in No. 489.]

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No. 599.

*Petition by wife, for alimony, in action by her for a limited divorce or separation.*

See Vol. II., p. 265, and note 39; id. 268, and notes 41, 42.

[*Title and address as in No. 598.*]

The petition of A. B., the plaintiff, respectfully shows: that your petitioner has commenced this action against the defendant, C. B., to



obtain a judgment of separation from bed and board forever, between your petitioner and said defendant, on the ground of the cruel and inhuman treatment of your petitioner by her said husband, the defendant. That the defendant has appeared and put in his answer, under oath, to the complaint herein, denying such cruel and inhuman treatment. That your petitioner is wholly destitute of the means of support, or of money for carrying on this action, [*continue as in No. 598, with the necessary variations.*]

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No. 600.

*Notice of motion upon petition for alimony.*

[*Title of cause.*]

Sir :

Take notice, that upon the petition with a copy of which you are herewith served, and upon the verified complaint [or, *answer*] herein, a motion will be made, at the next special term of this court, to be held at the [court house] in —, on the — day of — next, at the opening of the court, for an order that the defendant [or, *plaintiff*] pay to the plaintiff [or, *defendant*] the sum of — dollars, monthly, for her support during the pendency of this action, and the sum of — dollars, to enable her to defray the costs and expenses of prosecuting [or, *defending*] the said action ; or for such other or further order as the nature of the case may require.

Dated —.

J. C., Attorney for plaintiff,

[*Address.*]

[or *defendant.*]

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No. 601.

*Order of reference, as to alimony.*

At a special term, etc.

[*Title of cause.*]

On reading and filing the petition of C. B., the above defendant [or, *plaintiff*,] and the affidavits accompanying the same, and the affidavit of the plaintiff [or, *defendant*] in opposition ; and after hearing

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—, counsel for the defendant [or, *plaintiff*,] and —, counsel for the plaintiff [or, *defendant*,] it is *ordered* that it be referred to W. O., Esq., of —, as referee, to inquire into and report what would be a reasonable sum to be allowed to the defendant [or, *plaintiff*] for her support and maintenance [*and for the support and maintenance of such of the children of the marriage as reside with her,*] during the pendency of this action. And that the said referee inquire and report what would be a reasonable sum to be allowed to the said defendant [or, *plaintiff*] in order to enable her to carry on her defence [or, *prosecution*] of the action, and to defray the necessary costs and expenses thereof; and that he report as to the time and manner in which said sums should be paid by the plaintiff [or, *defendant*.]

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No. 602.

*Report of referee, as to alimony.*

[*Title of cause.*]

To the Supreme Court of the State of New York.

In pursuance of an order of this court, dated the — day of —, 18—, whereby it was referred to me, as referee, to inquire and report what would be a reasonable sum to be allowed, etc. [*as in order of reference.*] I, the said referee, do report, that I have been attended by the attorneys for the plaintiff and defendant, and have heard the allegations and proofs as to the value of the plaintiff's [or, *defendant's*] estate, at the time of the commencement of this action, and the allowance proper to be made. That the plaintiff [or, *defendant*] has real estate, to wit, [*specifying it,*] of the value of about — dollars, the yearly income from which is about — dollars; that the whole personal property of the said plaintiff [or, *defendant*] consists of [*specifying it,*] and its value is about — dollars. That two children of the plaintiff and defendant live with and are entirely supported by the defendant [or, *plaintiff*,] one being a boy, aged about — years, and the other a girl, aged about — years.

I further report that, in my opinion, the sum of — dollars a year, payable monthly, is a suitable allowance for the present separate maintenance and alimony of the defendant [or, *plaintiff*;] that it ought to be payable from the commencement of this action; that — dollars would be a reasonable sum to be allowed to the defendant [or,

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*plaintiff,*] to enable her to carry on her defence [or, *prosecution,*] and defray the necessary costs and expenses in this action.

All which is respectfully submitted.

Dated —.

W. O., Referee.

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No. 603.

*Petition for custody of minor child.*

See Vol. II., p. 265.

[*Title and address as in No. 598.*]

The petition of A. B. respectfully shows, that she has commenced an action against C. B., her husband, for a limited divorce on account of the cruel and inhuman treatment of your petitioner by her said husband, and that said action is at issue by the answer of the defendant.

That petitioner and the defendant have but one child, a female infant of the age of — years, who is now in the custody of the defendant; that the defendant refuses to allow said child to reside with your petitioner, or even to visit her, and claims the sole custody and control of it.

That the conduct of said defendant is such as to render it unsafe and impossible for your petitioner to live with him, and she has been obliged to take refuge with her relatives and friends; that his conduct is also grossly immoral, he being a man addicted to habits of intemperance, so as to render him a highly improper custodian and guardian of said child, whose tender years require the care and nurture of your petitioner.

That the said defendant neglects said child, etc., etc. [*specify any other material facts.*]

Wherefore, your petitioner prays that, by an order of this court, the custody of said infant child may be awarded to your petitioner, and said defendant be ordered and directed to deliver up said child to her, and be restrained and enjoined, henceforth, from claiming or interfering in any manner with said child, or with your petitioner in the custody thereof. Or for such other or further order as the nature of the case may require.

And your petitioner will ever pray, etc.

Dated —.

(Add verification, as in No. 594.)

A. B.

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No. 604.

*Order of reference, upon No. 603.*

At a special term, etc.

[*Title of cause.*]

On reading and filing the petition of A. B., bearing date the — day of —, 187—, and on motion of —, counsel for the petitioner, it is *ordered*, that it be referred to W. O., Esq., of —, as referee, to inquire into and ascertain the truth of the matters set forth in said petition, and to report to the court the facts, with his opinion thereon, with all convenient speed.

[And it is *further ordered*, that the said referee cause notice of the hearing before him upon said reference, to be given to the defendant, and to require the said infant child to be produced before him.]

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No. 605.

*Report of referee, under No. 604.*

[*Title of cause.*]

To the Supreme Court of the State of New York.

Pursuant to an order of reference made in this action, bearing date the — day of —, 18—, upon the petition of A. B., the plaintiff therein, praying that the care and custody of the infant child of said parties might be awarded to said petitioner, I, the said referee, do respectfully report, that having [*caused notice of the hearing upon said reference to be given to the defendant, and having*] been attended by the parties and their respective counsel [*and the said infant child having been produced before me*] I proceeded to inquire into the matters so referred, and after hearing the proofs and allegations of the parties, I find and report [*insert the findings of fact.*] And from the facts so found by me, I am of the opinion that the prayer of the said petition should be granted, and that the care and custody of the said infant child should be awarded to the petitioner until the further order of the court, [or, *that the prayer of said petition should be denied, and the said defendant should be allowed to retain the custody and care of said infant child, with liberty to said petitioner to visit said child, at such proper times and places as the court may direct, etc., etc.*]

## No. 606.

*Order awarding custody of minor child.*

At a special term, etc.

[*Title of cause.*]

On reading and filing report of W. O., Esq., the referee appointed by an order of this court, bearing date on the — day of —, 18—, whereby, among other things, it appears that the care and custody of —, the infant child of the parties to this action should be awarded to the said petitioner until the further order of the court [or, *that the prayer of said petition should be denied, and the said defendant should be allowed to retain the custody and care of said child, etc., as in No. 605.*] Now, therefore, after hearing counsel for the respective parties, on motion of J. C., counsel for the plaintiff [or, *defendant*], it is ordered that the report of said referee be ratified and confirmed, and that the care, custody and control of the said infant child be, and the same hereby is, awarded to said petitioner, A. B.; and that the defendant, C. B., forthwith deliver said infant child to said petitioner, and that the said C. B. be enjoined and restrained, henceforth, from interfering with said child, or with the plaintiff in her custody of said child, until the further order of the court. [Or, *that the prayer of said petition should be denied, and the said defendant be allowed, etc., as in No. 605, to the end.*]

## No. 607.

*Petition to revoke final judgment of separation.*

See Vol. II., p. 264.

[*Title of cause.*]

The petition of the above named plaintiff and defendant respectfully shows :

That a final judgment for a limited divorce and separation between said plaintiff and defendant, in the above entitled action, was duly entered on the — day of —, 18—, in the office of the clerk of — county.

That said parties have, since the entry of said judgment, become

reconciled to each other, and desire to resume their marital relations, and that said judgment should be revoked.

Wherefore, your petitioners pray that, by an order of this court, the said judgment may be declared revoked, pursuant to the statute in such case made and provided; and that the same may be cancelled and discharged of record.

And your petitioners, etc.

Dated —

A. B., Plaintiff.

C. B., Defendant.

— county, ss. On this — day of —, 18—, personally came before me the above named A. B. and C. B., to me well known to be the persons mentioned in above petition, and the parties to this action, and being by me duly sworn, did severally depose and say, that they had become reconciled to each other, and that the facts set forth in the foregoing petition signed by them are true.

L. V., Commissioner of deeds.

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No. 608.

*Order thereon.*

At a special term, etc.

[*Title of cause.*]

On reading and filing the joint petition of the above-named parties, bearing date the — day of —, 18—, and due proof that they have become reconciled to each other: on motion of J. C., counsel for the plaintiff, it is *ordered* that the judgment for a limited divorce or separation, entered in the above entitled action on the — day of —, 18—, in the office of the clerk of — county, be and the same hereby is revoked, and ordered to be discharged and cancelled of record. [*A clause may be added if the court so directs, requiring security to be given by husband for support of the wife and children; and making the revocation conditional upon security being given.*]

CHAPTER VIII.

CONTEMPTS. (a)

No. 609.

*Affidavit of service, on a party, on which to found proceedings for a contempt.*

See Vol. II., p. 278, and note 17.

[*Title of cause.*]

— county, ss. J. K., being duly sworn, says: that he is [*clerk in the office of*] the plaintiff's attorney in this action. That on the — day of —, inst., at —, he served the [*specifying paper*] hereto annexed [or, *a copy of which is hereto annexed*] on E. F. known to him, and known to be one of the [defendants] herein, by delivering the same [or *a copy thereof*] to him personally, and leaving the same with him: [*If the paper served was a judge's order, add:*] and that deponent at the same time exhibited to him the original of said order, with the signature of the Hon. —, affixed thereto. [*If the paper was an order of the court say:*] a true copy of said order, duly certified, at the foot thereof, by J. W. H., clerk of the county of —, in whose office said order had been duly filed.

Sworn, etc.

J. K.

(a) For forms of proceedings for contempt in Proceedings supplementary to execution—See No. 250 to 256.

CHAPTER IX.

PARTITION SUITS.

No. 610.

*Proceedings for appointment of guardians ad litem for infants, in partition suits.*

See Nos. 489 to 503, and see Vol. II., p. 293, and note 14; id. 294, and note 17.

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No. 611.

*Summons, with notice of object of suit.*

SUPREME COURT—County of—.

A. B. plaintiff against C. D. & E. D. his wife, G. H., etc., [names in full of all the defendants.]
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To the above named defendants.

You are hereby summoned to answer the complaint of A. B., the above named plaintiff, [a copy of which is hereto annexed] and to serve a copy of your answer, at his office in the village of —, within twenty days after the service of this summons, exclusive of the day of service; and if you fail to answer said complaint, as hereby required, the plaintiff will apply to the court for the relief demanded in the complaint.

[If the complaint has not been served, the words, “a copy of which is hereto annexed”— are to be omitted, and the words—“which will be



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filed in the office of the clerk of ——county”—inserted in lieu thereof, Or, if an order of publication has been granted—“ *which was filed in the office of the clerk of —— county, on the ——day of ——, 18—.*”]

Dated, ——.

J. C., Plaintiff's attorney.

[*If the complaint has not been served, the following notice of the object of the suit, is to be written at the foot of the summons:*]

To C. D., one of the above defendants.

Take notice, that the object of the action entitled in the above summons, is to obtain the partition, or the sale, if partition cannot be made without prejudice to the interests of the owners, of certain real estate situate in the town of ——, in the county of ——, [*briefly describing the premises* ;] and that no personal claim is made against you.

Dated ——.

J. C., Plaintiff's attorney.

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No. 612.

*Complaint, in a partition suit.*

See Vol. II., p. 290, and note 10 ; id. 291, and note 11.

[*Title as in No. 611.*]

The above named plaintiff complains of the above mentioned defendants, and alleges as follows : that the plaintiff and the defendants, C. D. and E. F., own and possess as joint tenants [or, *as tenants in common,*] the following described premises, situate in the town of ——, in the county of ——, [*describe premises, particularly* ;] and that the plaintiff desires to have a partition thereof.

That the plaintiff has an estate of inheritance, therein, of one undivided fourth interest in the fee thereof [or, *other estate, according to the fact.*]

That each of the defendants [*co-tenants*] has a similar estate in one undivided fourth interest in the same [or, *otherwise.*]

[*Where an infant is a party, say :*] That the plaintiff owns no other land, in this state, in common with the said [*co-tenants.*]

[*Where the lands are subject to dower.*] That the defendant [*dowress*] is the widow of T. B., the father of the plaintiff and said [*co-tenants,*] from whom they inherited said premises ; and, as such widow, claims

a right of dower, therein, which has not been admeasured in [*the following described part of*] said premises.

[*Where premises are subject to a judgment.*] That the defendant [*judgment creditor*] holds a judgment, recovered by him [or, *by* —, and *thereafter duly assigned to him*] rendered in the — court, on or about the — day of —, 18—, against [*one or more of the co-tenants*] and docketed in said county of —, [*place where premises are situated*] on the — day of —, 18—, and which remains unpaid, and unsatisfied, of record.

[*Where premises are subject to a mortgage.*] That the defendant [*mortgagee*] holds a mortgage upon the interest of [*one of the co-tenants*] for — dollars, dated —, and payable on the — day of —, 18—, with interest from the — day of —, 18—.

[*Where there are unknown owners.*] That J. B., who, in his lifetime, had an estate of inheritance in the said premises, of one undivided fourth interest, in the fee [or, *otherwise*] several years since removed from this state to the state of —. That he subsequently married and had children, some of whom are now living; but their names and places of residence are wholly unknown to the plaintiff, and he is unable to ascertain the same, or either of them, although he has made diligent inquiries for that purpose. That the said J. B. and his wife are now dead; and that said children and heirs, or the heirs-at-law of any who may have died, are, collectively, entitled to the undivided fourth part of said premises to which the said J. B. would be entitled, if living.

Wherefore, the plaintiff demands judgment for a partition and division of the above described premises according to the respective rights of said parties, and the course and practice of this court; or, if it shall appear that a partition thereof cannot be made without material injury to the rights of the parties interested therein, then that the said premises may be adjudged to be sold, under the direction of this court, and the proceeds of the sale, after paying the costs and charges of this suit, be divided among the said parties, according to their respective rights and interests therein; and that, to that end, the rights and interests of the parties interested in said premises, or in the proceeds thereof, may be ascertained and declared by the judgment of this court; and that the plaintiff may have such other relief, or such further relief, in the premises, as the nature of the case may require.

J. C., Plaintiff's attorney, —, N. Y.

• [*Verification of plaintiff.*]

No. 613.

*Notice of lis pendence, in partition suit.*

See Vol. II., p. 293, and note 12.

[*Title of cause.*]

Notice is hereby given to all whom it may concern, that this action is brought against the defendants to obtain a partition and division of the premises described in the complaint, among the owners thereof, by commissioners to be appointed for that purpose ; or, in case a partition thereof cannot be made without material injury to the rights of the parties interested, then for a sale thereof, under the direction of this court, and for a division of the proceeds of such sale, among such owners, according to their several and respective rights and interests therein. Such premises are described in the complaint as follows :  
[*insert description.*]

Dated —.

J. C., Plaintiff's attorney.

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No. 614.

*Affidavit of filing notice of lis pendens.*

[*Title of cause.*]

— county, ss. J. C., the plaintiff's attorney in the above cause, being duly sworn, says, that this action was brought to obtain a partition or sale of the premises described in the complaint therein. That a notice of the pendency of this action, and of the general object thereof, and containing a general description of the land sought to be partitioned, or sold, as the same is described in the complaint, was filed in the office of the clerk of — county, that being the county in which the premises are situated, on the — day of —, 18—. That at the time of filing the said notice the premises therein described were, and now are, situated in the town of —, in the said county of —; and that since the filing of said notice, the complaint in this cause has not been amended by making new parties to the suit, or so as to affect other property, not described in the original complaint.

Sworn, etc.

J. C.

[Or, annex to the notice the following affidavit.]

— county, ss. J. C., attorney for the plaintiff in the above cause, being duly sworn, says, that a notice of *lis pendens* of which the above [or, annexed] is a copy was, on the — day of —, 18—, filed in the office of the clerk of — county, in which county said premises are situated, to wit, in the town of —, in said county.

Sworn, etc.

J. C.

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No. 615.

*Order for publication as to unknown owners.*

See No. 19.

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No. 616.

*Answer of infants in partition suit.*

See Vol. II., p. 294, and note 18.

[*Title of cause.*]

The joint and several answer of E. F. and G. H., two of the defendants, infants under the age of twenty-one years, by L. M., their guardian *ad litem*, to the complaint of A. B., plaintiff.

These defendants, answering by their said guardian, say, that they are strangers to all and singular the matters and things in the said complaint mentioned; that these defendants are infants under the age of twenty-one years, and claim such interest in the premises in the said complaint mentioned, as they are entitled to; and submit their rights and interests to the protection of the court.

A. P., Attorney for guardian *ad litem*.

## No. 617.

*Notice of application for the relief demanded in the complaint, and for order of reference on default.*

[*Title of cause.*]

Gent. :

Take notice that upon the pleadings and proceedings in this cause, and the usual proof of due service of the summons upon all the defendants, and the affidavit, with a copy of which you are herewith served, the plaintiff will apply, at the next special term of this court to be held at the —, in the city of —, on the — day of — next, at the opening of the court on that day, for the relief demanded in the complaint, and for the usual order of reference under the 79th rule of this court. [*If an application be made to set off two or more shares in common, add.:*] And that the referee be directed to ascertain and report whether the shares of G. B. and J. B., are so situated that they may be set off in common to them, without injury to the interests of the other parties.

Dated —.

J. C., Plaintiff's attorney.

To A. P., Attorney for defendants C. B. and others.

To H. M., Attorney for guardian *ad litem* of infant defendants.

## No. 618.

*Order of reference on default, where there are no infants or absentees.*

See Vol. II., p. 296, and note 19 ; Rule 79.

At a special term, etc.

[*Title of cause.*]

On reading and filing proof of personal service of summons on all the defendants, and that notice of *lis pendens* has been filed, more than twenty days since, and an affidavit showing that this action is brought for a partition of certain real estate described in the complaint herein, and that all the defendants are residents of this state and of full age, (\*) and that no answer has been received on behalf of any defendant [*except the defendant L. B., who has put in an answer, in which the rights and interests of the several parties as stated in the complaint are not contested or denied;*] on motion of J. C., plaintiff's attorney, it is

ordered, that it be referred to W. O., Esq., of —, to take proof of the title of the respective parties, in the premises mentioned in the complaint, and report thereon to the court, with an abstract of the conveyances by which the title is held.

---

No. 619.

*The like—where there are infants, unknown owners, or absentees.*

[As in No. 618 to the (\*), then add:] except the defendant, E. D., who is an infant under the age of twenty-one years [or, *who is an absentee, and has been served by publication*; or, *the heirs of* —, *unknown owners*, as the case may be]; and that no answer has been received on behalf of any of the defendants; except the said infant, who has by his guardian *ad litem*, put in the usual general answer; on motion of J. C., attorney for the plaintiff, it is *ordered* that it be referred to W. O., Esq., of —, to take proof of the plaintiff's title and interest in and to the premises mentioned in the complaint, and of the several matters therein set forth; and to ascertain and report what share of the said premises belongs to each of the parties to this action, so far as the same can be ascertained, and the nature and extent of their respective rights and interests, and report thereon to this court, with an abstract of the conveyances by which the said land is held.

[Where two or more parties desire their shares to be set off in common, add:] And it is *further ordered* that the said referee ascertain whether the said premises are so situated that the shares of the said plaintiff and of the defendant, N. B., can be set off to them in common, without any partition or allotment between them, and without injury to the interests of any of the parties; and that he report the facts, with his opinion thereon, to the end that such further order may be made in the premises as shall be just and necessary.

No. 620.

*Report of referee, as to title, etc., and that partition can be made.*

See Vol. II., p. 297, and note 20.

[*Title of cause.*]

To the Supreme Court of the State of New York.

In pursuance of an order of reference made by this court in the above entitled action, bearing date on the — day of —, 18—, by which it was, among other things, referred to me, as referee, to take proof of the plaintiff's title and the several matters set forth in the complaint, I respectfully report: That having been attended by the attorney for the plaintiff, I proceeded to a hearing of the matter so referred (on due notice given to the attorneys of such of the defendants as have appeared, in the action,) and having taken proofs and duly examined the matters so referred, I find and report that the material allegations set forth in the complaint are true.

And I further report that the respective estates and interests of the several parties in the premises are as follows: [*as in No. 507 of the text.* See Vol. II., p. 714.]

I further report that the premises are so situated that a partition thereof can, in my opinion, be made, without material injury to the rights and interests of any of the parties, the same being a farm containing about — acres, etc., etc., [*stating the facts concerning it.*]

The schedule hereto annexed contains an abstract of the conveyances by which the title to said premises is held. [*As in No. 507 of the text.* See Vol. II., p. 715.]

All of which is respectfully submitted.

Dated —.

W. O., Referee.

No. 621.

*Notice of filing report of referee.*

See Rule 39.

[*Title of cause.*]

Sir:

Take notice that the report of the referee, to whom it was referred to take proof of the plaintiff's title, etc., in this action, and report the

APPENDIX OF PRECEDENTS.

same to this court, with an abstract of the conveyances by which the same is held, which report bears date the — day of —, 18—, was filed in the office of the clerk of — county, on the — day of — instant.

Dated —.

Yours, etc.

J. C., Plaintiff's attorney.

To —, Esq., Att'y for defendant —.

---

No. 622.

*Notice of hearing, upon report of referee.*

[*Title of cause.*]

Sir :

Take notice that the above entitled cause will be brought on for hearing, and application will be made for judgment for the relief demanded in the complaint, that is to say, for a partition of the premises described in the complaint herein, and upon the pleadings and proceedings in this action, the order of reference and the report of the referee thereon, at the next special term of this court to be held at the —, in the city of —, on the — day of — next, at the opening of the court on that day; and a motion will then and there be made for the appointment by the court, of three reputable freeholders, as commissioners to make partition of the premises described in the complaint, according to the respective rights and interests of the parties, to be adjudged by said court.

Dated —.

J. C., Plaintiff's attorney.

[*Address.*]

---

No. 623.

*Order of reference when a sale is necessary.*

[*As in No. 618 to the end, then add.:*] and it is *further ordered* that the said referee inquire and report whether the said premises, or any lot or separate parcel thereof, are so circumstanced that an actual partition cannot be made; and if the said referee arrives at the conclusion



that a sale of the whole premises, or of any lot or separate parcel thereof, will be necessary, that he specify the same in his report, together with the reasons which render a sale necessary; and in such case that he also ascertain and report whether any creditor, not a party to this suit, has a specific lien by mortgage, devise or otherwise, upon the undivided share or interest of any of the parties in that portion of the premises which it is necessary to sell; and if he finds that there is no such specific lien, in favor of any person not a party to the suit, that he further inquire and report whether the undivided share or interest of any of the parties, in the premises, is subject to any general lien or incumbrance, by judgment or decree.

And it is *further ordered* that such referee ascertain and report the amount due to any party to the suit who has either a general or specific lien on the premises to be sold, or any part thereof, and the amount due to any creditor, not a party, who has a general lien on any undivided share or interest therein, by judgment or decree, and who shall appear and establish his claim, on such reference.

And it is *further ordered* that the said referee, if requested by the parties who appear before him on such reference, shall also ascertain and report the amount due to any creditor, not a party to the suit, which is either a specific or general lien or incumbrance upon all the shares or interests of the parties, in the premises to be sold, and which would remain as an incumbrance thereon, in the hands of the purchaser.

---

No. 624.

*Notice by referee to creditors having general liens or incumbrances.*

[*Title of cause.*]

In pursuance and by virtue of an order of this court, made in the above cause, on the — day of —, 18—, notice is hereby given to all persons having any general lien or incumbrance, by judgment or decree, or otherwise, on the undivided share or interest of any of the owners, in the premises hereinafter described, to produce to me, the undersigned, on or before the — day of — next, at my office in —, proof of their respective liens and incumbrances, together with satisfactory evidence of the amount due thereon; and to specify the

nature of such incumbrances, and the dates thereof, respectively. The said premises are described in the complaint as follows: [*insert description.*]

Dated ———.

W. O., Referee.

No. 625.

*Report of referee, that a sale is necessary.*

See Vol. II., p. 307, and note 34.

[*As in No. 620 to the end, then add:*] I further report that the premises described in the complaint are so circumstanced that, in my opinion, a partition thereof cannot be made without great prejudice to the owners thereof. The premises consist of about ——— acres of land, a part of which is covered with timber. A part of the land is of inferior quality. The premises are of about the proper size to be cultivated advantageously as a single farm. There is but one dwelling house on the premises. These facts in connection with the number of owners in common, and the minuteness of the interests of the infants, being one-fiftieth each, render a partition very difficult, if not impracticable.

I further report that I have caused the necessary searches to be made, and I find that no creditor, not a party to the suit, has any specific lien by mortgage, devise or otherwise, upon the undivided share or interest of any of the parties, in the premises; and that there is no general lien or incumbrance, by judgment or decree, upon the undivided share or interest of either of the parties in the premises.

And I further report that no creditor, not a party to this suit, having a general lien on any undivided share or interest in the premises, by judgment or decree, appeared before me on the said reference, to establish his claim, in pursuance of the notice published by me, as aforesaid.

All of which is respectfully submitted.

Dated ———.

W. O., Referee.

APPENDIX OF PRECEDENTS.

No. 626.

*Notice of filing report of referee (No. 625), and of application for judgment of sale.*

[*Same as in No. 621, adding at the end thereof:*] And that upon the said report and order of reference, and upon the pleadings and proceedings in this action, an application will be made at the next circuit and special term of this court, to be held at the court house in —, on the — day of — next, at the opening of the court on that day, for final judgment for the relief demanded in the complaint, viz. : for a sale of the premises described in the complaint, according to the statute and the practice of this court; and for such other or further order as the court may think proper to grant.

Dated —.

J. C., Plaintiff's attorney.

# BOOK VI.

## COSTS.

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### CHAPTER I.

#### GENERAL RULES RESPECTING THE GRANTING OR REFUSAL OF.

No. 627.

*Notice of motion for extra allowance of costs.*

See Vol. II., p. 864 (foot-paging,) note 5, sub. 5.

[*Title of cause.*]

Sir.

Take notice that [on the affidavit, and the certificate of W. O., Esq., the referee, of which copies are herewith served, and] on all the proceedings in this action, the [plaintiff] will move the court, at the next [*circuit and*] special term thereof, to be held at —, on the — day of — next, at the opening of the court on that day, for an order directing that an extra allowance of costs be made to him, in addition to the usual costs.

Dated —.

J. C., Plaintiff's attorney.

To A. P., Esq., Defendant's attorney.

No. 628.

*Order at circuit, for extra allowance.*

At a circuit court, etc. [*as in No. 128.*]

[*Title of cause.*]

The plaintiff in this action having recovered of the defendant the sum of — dollars, and it being a difficult and extraordinary case [or, the defence having been unfairly or unreasonably conducted,] it is *ordered* that the plaintiff be, and he hereby is, allowed ten per cent. on the amount of such recovery, by way of additional costs.

CHAPTER IV.

TAXATION (ADJUSTMENT), ETC.

No. 629.

*Bill of costs and disbursements.*

See Vol. II., pp. 341, 34, and note 15.

[*Title of cause.*]

COSTS.	
Costs before notice of trial.....	
“ after “ “ .....	
Additional defendants served.....	
Trial fee, issue of fact .....	
“ “ issue of law .....	
Allowance by statute.....	
“ by court.....	
Motion .....	
Trial occupied more than two days,	
Appointment of guardian of infant	
defendant .....	
Examination of party before trial..	
Attending and taking deposition <i>de</i>	
<i>bene esse</i> .....	
Drawing interrogatories to annex to	
commission .....	
Making and serving case.....	
“ “ amendment to case	
“ “ case of more than	
50 folios.....	
Term fees..... Terms.....	
Motion for new trial, special term..	
Proceedings before and after grant-	
ing new trial .....	
Application for judgment on special	
verdict before argument.....	
Application for judgment on special	
verdict for argument.....	
Appeal to general term before arg.	
Appeal to general term for arg.	
Appeal to court of appeals bef. arg.	
Appeal to court of appeals for arg.	
Preparing case on appeal to court of	
appeals .....	
Damages in court of appeals for delay	
Interest on verdict.....	

DISBURSEMENTS.	
Referee's fees .....	
Commissioner's fees.....	
Clerk's fees .....	
Paid for searches.....	
Affidavits and acknowledgments....	
Serving copy summons and compl't	
Paid referee's report.....	
Certified copies orders.....	
Satisfaction piece.....	
Transcript and filing.....	
Certified copy judgment.....	
Postage .....	
Stenographer's fee.....	
Sheriff's fees on execution.....	
Sheriff's fees on attachment.....	
Sheriff's term fee..... Terms.....	
Extract from minutes.....	
Paid printing cases.....	
Paid printing points.....	
Paid copies following papers:	

Attendance of following witnesses :

Disbursements .....

Total .....

APPENDIX OF PRECEDENTS.

—— county of ——, ss. J. C., the attorney for the —— in the above entitled action, being duly sworn, says that the foregoing disbursements have been made in this action, or will be necessarily incurred therein, to the best of his knowledge and belief.

J. C.

Sworn to, before me, this —— }  
day of ——, 187—.

---

No. 630.

*Affidavit of attendance of witnesses.*

[*To be annexed to bill of costs.*]

County of Saratoga, ss. J. C., being duly sworn, says, that he is the attorney for the plaintiff in the within entitled action. That the within named witnesses were actually in attendance the within named number of days.

J. C.

Sworn to before me this —— }  
day of ——, 18—.

---

No. 631.

*The like—another form.*

[*Title of cause.*]

—— county, ss. A. B., the plaintiff [or attorney for the plaintiff,] being duly sworn, says, that this action was at issue and necessarily upon the calendar for trial at the several circuits held in and for the county of Saratoga, at the court house in the town of Ballston Spa, viz.: one commenced on the —— day of ——, 18—; one commenced on the —— day of ——, 18—. [That the cause was referred to W. O., Esq., as referee, and was brought to trial before him at his office in ——, on the —— day of ——, 18—.] That each of the persons named in schedule A, hereto annexed, which is made a part hereof, attended the several circuits [or, special terms or hearings] therein named pursuant to a subpoena, or upon special request of this deponent, as a witness for the plaintiff the number of days set opposite their respective names therein. That the residence of said witnesses respec-

APPENDIX OF PRECEDENTS.

tively, the distance therefrom, according to the usually traveled route, to the said court house [or, place of hearing,] and the number of miles they severally traveled as such witnesses, according to the usually traveled route, for the purpose of going to the place of trial and returning therefrom, at said circuit courts [or, *hearings*] respectively, are correctly stated and set forth in said schedule A, opposite their respective names. That each and every of said persons named in said schedule A, was a necessary and material witness on the part of the plaintiff, on the trial of this action. A. B.

Sworn and subscribed before me }  
 this — day of —, 187—. }

SCHEDULE A.

Circuit [or, *special term or hearing*,] commenced on the — day of —, 187—.

NAMES OF WITNESSES.	RESIDENCE.	Miles from Court House or hearing.	Miles Traveled.	No. days attended.

[Proceed in same manner as to the subsequent circuits, etc.]

No. 632.

*The like—another form.*

[As in No. 630 to the (\*), then add:] Deponent further says: that G. H., J. K. and L. M. were severally necessarily subpoenaed and attended as witnesses on the part of the plaintiff [or, *defendant*] in this action; and that they were severally and necessarily in attendance — days each, on the trial of this action; and the said G. H. and J. K. each traveled — miles from the town of —, their place of residence, to attend the trial of this action.



APPENDIX OF PRECEDENTS.

[*When there is a foreign witness, add :*] That L. M. resides in the town of —, in the state of —, and traveled from that town to the place of trial, to attend said trial as a witness for the plaintiff [or, *defendant* ;] and that he was a material and necessary witness, and necessarily attended as such — days. That he came from his said residence to said place of trial, [*by the — railroad,*] which is the nearest usually traveled route between said places ; and that on said route, he entered this state at —, and traveled — miles therefrom to said place of trial.

Sworn etc.

J. C.

---

No. 633.

*Notice of adjustment of costs.*

See Vol. II., pp. 868, 895, (foot-paging.)

Sir :

Take notice, that we shall present a bill of costs, of which the foregoing is a true copy, to the clerk of this court for adjustment, at his office in —, on the — day of —, 18—, at — o'clock in the —noon of that day.

Yours, etc.,

Dated —, 187—.

J. C., Attorney for plaintiff.

To A. P., Esq., Attorney for defendant.

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