

JOHN L. KERR AND OTHERS  
 ADMRS. D. B. N. OF SAMUEL HARRISON, }  
 vs. } SEPTEMBER TERM, 1848.  
 ROBERT N. MARTIN AND OTHERS. }

[PRACTICE IN CHANCERY.]

PROOF taken under an *ex parte* commission cannot be read against defendants who answered an original bill, though they failed to answer a bill of revivor in the same case and an interlocutory decree was passed against them for such default.

[The facts of this case are stated in the opinion of the Chancellor.]

THE CHANCELLOR :

In this case a bill was filed by John Leeds Kerr, executor of Samuel Harrison, on the 8th of January, 1841, for the purpose of obtaining a decree for the sale of the real estate of Lloyd Nicholas upon the allegation of the insufficiency of the personalty.

After answers were filed to this bill, putting the plaintiff to the proof of his claim, and requiring him to show his title, to have recourse to the real estate of the deceased, the plaintiff in the cause died, and a bill of revivor was filed in the names of the administrators, *de bonis non*, of Harrison.

Some of the defendants answered this bill of revivor, but others of them being in default for not appearing and answering an interlocutory decree passed against them on the 28th of February, 1846, and an *ex parte* commission issued to prove the allegations of the original bill and bill of revivor. The commission issued accordingly, and having been returned, the case is now submitted by the plaintiff for a decree upon the proof taken under it, and notes are put in by the solicitors of the parties.

The defendant's counsel insists either that the case is not ready for a decree, and if now ready to be heard, it must be heard as if no proof was taken.