

nal case, it appears, that there had been a return against *Scott*, the defendant, attached for not appearing; in consequence of which, on the 30th of March, 1824, the usual order *nisi* was passed, requiring him to appear and answer by the *fourth* day of the next July term, which commenced on the thirteenth, and closed on the twenty-fourth day of the same month. Therefore, at any time after the 17th day of July, 1824, the parties might have obtained the decree, which was signed on the 4th of August, 1825.

That they did not obtain it sooner can only be imputed to their own misunderstanding, negligence, or indulgence; because, the court, on application, would have inspected the proceedings, and have done on the next day, after that day, precisely that which it did, when called upon one year after. The plaintiffs in that case, then, owing to their own negligence or indulgence, stood in no better situation at the July term, 1825, than they did at the July

of an answer. The act of 1799, appears to have provided a remedy for this inconvenience,—the 9th section, relating to defendants appearing agreeably to an order, limiting a day for such appearance, which is done by the order of publication. An appearance was entered for the defendant at July term, but no answer has been put in. It is urged by the counsel for the defendant, that the bill ought not to be taken *pro confesso*, but that a commission should be issued, under which payments of a part of the mortgage debt might be proved. But it was in the power of the defendant to put in his answer alleging such payments, on which an opportunity would, of course, have been given for the proof of them by commission, or before the auditor. There is nothing to shew, that it is essential to the justice of the case, that a commission should be issued, or even that it should be put before the auditor, the claim being *prima facie* established by the mortgage, and the affidavit of the complainant.* But in order that injustice may not be done to the defendant, inasmuch as the time usually limited for bringing in the money due in such case will go beyond the sitting of December term, the decree is made not to be absolute until the 10th day of that term, during which, on sufficient cause being shewn, such alteration may be made as shall then appear necessary. Decreed, that the property in the proceedings mentioned be sold, &c.

HEPBURN v. MOLLINSON.—The defendants, having been summoned, had failed to appear, upon which the plaintiff obtained an interlocutory decree, in the usual form, under the act of 1820, on the 14th of July 1821. After which, on motion by the defendants, Caleb D. Goodwin and others, to appear and to have the interlocutory decree rescinded—

18th July, 1821,—**KILTY, Chancellor.**—Ordered, That the decree be rescinded, together with the order for the commission. This order is made under the general power of the court, being the same term; and not on the third section of the act of 1820, ch. 161, which may apply where the term is past. An answer is not therefore required with the appearance, but the suit will stand as if an appearance had been entered in the usual way.

* It appears that the plaintiff's affidavit of the sum due, in the usual form, made before a justice of the peace, was endorsed on the mortgage.